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No. _____

In The

Supreme Court of the United States

NOVOLOG BUCKS COUNTY,

Petitioner,

v.

CSX TRANSPORTATION COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

CONRAD O. KATTNER
Counsel of Record
FREDERICK A. TECCE
MCSHEA\TECCE, P.C.
1717 Arch Street, 28th Floor
Philadelphia, PA 19103
(215) 599-0800

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in determining, in conflict with the Seventh Circuit, that a transloader or other such entity – that is not a party to a rail carrier's transportation contract or any contract whereby it agrees to accept demurrage liability, has no beneficial ownership of the freight at issue, and does not authorize a consignee designation – is automatically liable for demurrage charges under a rail carrier's tariff because a third party unilaterally lists it as the consignee on a bill of lading and it accepts delivery of the freight, in the absence of compliance with the consignee-agent provision of the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10743(a)(1).

2. Whether the Third Circuit erred in determining that the consignee-agent provision of the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10743(a)(1), applies to the assessment of demurrage charges in conflict with the Seventh Circuit's decision to the contrary with respect to the predecessor of the statute.

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

The caption of this petition contains the names of all the parties to the proceeding in the court below whose judgment is sought to be reviewed.

Petitioner, Novolog Bucks County, the defendant-appellee below, is a non-governmental corporation whose parent corporations are: IQ Martrade Holding und Managementgesellschraft mbH and Levendaal Venture Capital, B.V. There are no publicly held companies that own 10% or more of Novolog Bucks County stock.

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Third Circuit ("Third Circuit"), vacating judgment as a matter of law in favor of Novolog Bucks County, and remanding the case for further proceedings in the United States District Court for the Eastern District of Pennsylvania ("district court"), as amended, is reported as *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007) and reproduced at Appendix ("App.") 1-34.

The district court's memorandum and order denying the parties' cross-motions for summary judgment is unpublished, but reported as *CSX Transp. Co. v. Novolog Bucks County*, No. 04-CV-4018, 2006 WL 1451280 (E.D. Pa. May 24, 2006) and reproduced at App. 37-79. The district court's c der denying the motion for reconsideration of plaintiff, CSX Transportation Company ("plaintiff"), is not reported and is reproduced at App. 83-84. The district court's order denying plaintiff's second motion for reconsideration is not reported and is reproduced at App. 82. The district court's order modifying the reasons for its denial of plaintiff's initial motion for reconsideration is not reported and is reproduced at App. 81. The district court's order entering judgment as a matter of law in favor of defendant, Novolog Bucks County, is unpublished and reproduced at App. 80.

JURISDICTION

The Third Circuit filed the opinion and order at issue on September 5, 2007. The Third Circuit entered the judgment sought to be reviewed on September 5, 2007. The Third Circuit issued minor amendments to the September 5, 2007 opinion by order entered on September 14, 2007. The Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of the Third Circuit on a writ of certiorari.

STATUTORY PROVISIONS AND REGULATION INVOLVED

49 U.S.C. § 10743(a)(1)

Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property –

(A) of the agency and absence of beneficial title; and

> (B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10746

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to –

> (1) freight car use and distribution; and
>
> (2) maintenance of an adequate supply of freight cars to be available for transportation of property.

CSX Transportation Tariff CSXT 8100,
Demurrage Section, Section VIII-C

The pertinent text of this tariff is reproduced at App. 85-99.

STATEMENT OF THE CASE[1]

Petitioner, Novolog Bucks County ("Novolog"), the defendant/appellee below, is a Pennsylvania corporation with its principal place of business in Pennsylvania.

[1] Unless otherwise noted the facts are taken from the Third Circuit opinion, *Novolog Bucks County*, 502 F.3d at 250-52, App. 1-8 and from the district court memorandum at App. 37-43.

Respondent, CSX Transportation Company ("CSX"), the plaintiff/appellant below, is a Virginia company with its principal place of business in Florida.

CSX filed a complaint in the United States District Court for the Eastern District of Pennsylvania ("district court") on August 24, 2004, and an amended complaint on November 18, 2004, asserting that Novolog was liable for demurrage[2] pursuant to its tariff entitled "CSXT 8100, Demurrage Section, Section VIII-C" ("CSX's Tariff"). The district court had diversity jurisdiction under 28 U.S.C. § 1332 and federal question jurisdiction under 28 U.S.C. § 1337 over CSX's claim which arose under the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*

CSX sought to impose demurrage against Novolog in the amount of $260,304.00 as set forth on twelve invoices that CSX referred to as "Original Incidental Bills" ("Incidental Bills"). The Incidental Bills have various waybill dates from October 14, 2002 through November 3, 2004. CSX asserted that seven of the Incidental Bills were for inbound demurrage charges in the amount of $214,632.00 assessed against Novolog in an alleged capacity as consignee for certain export steel, and five of the Incidental Bills were for outbound demurrage charges in the

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[2] Demurrage, in the context of railroads, is defined as "a charge exacted by a carrier from a shipper or consignee on account of a failure on the latter's part to load or unload cars within the specified time prescribed by the applicable tariffs[.]" BLACK'S LAW DICTIONARY 432 (6th ed. 1990).

amount of $45,672.00 assessed against Novolog in an alleged capacity as shipper/consignor for certain import steel.

CSX filed certain admissions of fact (App. 118-119) and did not contest various facts set forth in Novolog's Statement of Undisputed Facts submitted in support of Novolog's Motion for Summary Judgment in the district court proceeding.[3] CSX also did not contest the district court's findings of fact on its appeal to the Third Circuit. The facts material to the consideration of the questions presented in this petition are as follows.

During the relevant times, Novolog operated a private railroad port on the Delaware River as a tenant at the U.S. Steel Fairless Works facility in Fairless, Pennsylvania, and CSX was a rail common carrier.

According to CSX's Tariff, which is published on CSX's web site and incorporated into CSX's transportation contracts, its purpose is "to describe how the time railcars are under the control of customers is

[3] Specifically, CSX did not contest the facts set forth in Novolog's statement of undisputed facts ("UDF") submitted in support of Novolog's motion for summary judgment at UDF ¶¶ 1-14, 18-20, and 22-24. App. 123-131. In its brief in opposition to Novolog's motion, CSX contested only UDF ¶¶ 15, 16, and 21. App. 120-122.

defined, and to specify the prices that CSXT[4] charges should a customer retain control of rail cars beyond the time incorporated into [CSX's] freight rates." App. 85. Application Item 8000 of CSX's Tariff indicates that the document "applies to all CSXT served customers." App. 85.[5]

Novolog's port functioned as a transfer point for the import, export, and domestic transportation of steel. Novolog was recognized as an open gate facility, meaning that within its 700 car facility it received and held railcars on its tracks at the convenience of rail carriers. Although Novolog operated the port at the Fairless Works facility, rail services within and around the port frequently were provided by Conrail Shared Assets ("Conrail"), an entity related to CSX. All railcars were delivered and picked up by Conrail, with the exception of "unit trains" which were delivered and picked up directly by CSX and the Norfolk Southern Railway Co. The Conrail crew routinely

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[4] CSX was referred to as "CSX" or "CSXT" interchangeably in certain documents CSX produced during discovery in the district court proceeding.

[5] As set forth in CSX's Tariff, a person receiving its railcars for unloading, or ordering empty railcars for loading, had two days to do so and return the cars to service; if the cars were kept beyond this time, demurrage charges would be assessed. In particular, CSX's Tariff Item 8070-G provides: "[u]nless otherwise advised in WRITING, that another party is willing to accept responsibility for demurrage, consignor at origin or consignee at destination will be responsible for the payment of demurrage charges." App. 92-93.

moved railcars between Novolog's port and Conrail's local rail servicing yard at Morrisville, Pennsylvania.

In early 2003, CSX entered into numerous freight agreements with various steel companies for the shipment to and eventual export of steel freight from Novolog's port. CSX and the steel companies negotiated the timing and logistics of these agreements. Novolog was not a party to these negotiations or the resulting agreements. Novolog was not involved in the preparation of the bills of lading[6] for these freight shipments. The freight was not ordered in Novolog's name, and Novolog did not furnish forwarding directions for the freight. Novolog, however, was engaged in unloading full railcars for export and loading empty cars for import.

With respect to inbound railcars (Novolog's export business), Novolog received loaded railcars, unloaded them according to instructions from various domestic steel companies, transferred the freight onto other means of transportation, and eventually released the railcars back to CSX.[7] According to CSX,

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[6] A bill of lading is the basic transportation contract between the shipper/consignor and the carrier. *S. Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982).

[7] The district court determined that CSX asserted "without evidentiary support" that: (1) Novolog had contracts with these steel companies for the handling of the steel freight; and (2) Novolog knew the steel was inbound before it arrived and had specific instructions from shippers on how to handle the steel freight. App. 40-41.

the steel companies identified Novolog as the "ship to" party or the consignee on the waybills and bills of lading for the steel freight in these railcars.

With respect to outbound railcars (Novolog's import business), Novolog received empty railcars from Conrail, loaded them with steel freight at its facility according to instructions from various entities, and released them to Conrail with the shipping instructions and final destination information it was provided. According to CSX, Novolog was listed as the shipper on the waybills and bills of lading for the steel freight in these railcars.

Also in early 2003, fluctuations in the price of steel caused a significant increase in the amount of steel delivered for export to the Novolog facility. As a result, Novolog was unable to perform loading and unloading operations within the two-day time frame established by CSX's Tariff, and CSX began charging Novolog demurrage fees. Novolog refused to pay these charges, arguing it was not liable for demurrage.

On January 6, 2006, both Novolog and CSX filed motions for summary judgment in the district court proceeding in support of their respective positions concerning CSX's demurrage claim against Novolog and Novolog's counterclaim against CSX.[8]

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[8] Novolog asserted a counterclaim against CSX for breach of a switching agreement between the parties set forth in a document called a "Refund Contract" on which it eventually prevailed at trial. The counterclaim was not a subject of CSX's

(Continued on following page)

With respect to the inbound demurrage invoices, CSX asserted that Novolog was the consignee for all inbound freight at issue because: (1) Novolog was named as the sole consignee on the purported waybills and bills of lading for the loaded railcars delivered to Novolog's facility without any limiting designations such as "care of" or "account of"; (2) the data fed by CSX into the "car and train reporting" computer system instructed the Conrail crew at Morrisville to deliver the cars to Novolog; (3) Novolog accepted delivery of these loaded railcars; (4) Novolog was liable for demurrage as an agent for various unnamed consignees; (5) Novolog failed to comply with the consignee-agent provision of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10743(a)(1); and (6) Novolog had knowledge of the rail industry's general demurrage practices.

With respect to outbound demurrage invoices, CSX asserted that Novolog was the shipper/consignor for all outbound freight at issue because: (1) Novolog was listed as the sole shipper and Fairless, PA was listed as the origin on the purported waybills and bills of lading; and (2) Novolog ordered the empty railcars for its own transportation purposes.[9]

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underlying appeal to the Third Circuit and has no relevance to the issues in this petition.

[9] CSX admitted in its brief to the Third Circuit that for each of the freight shipments (inbound or outbound) at issue, Novolog

(Continued on following page)

Novolog asserted that it was not bound by CSX's Tariff based on the following undisputed facts: (1) it was not a party to CSX's transportation contracts for the freight shipments at issue; (2) it never executed any contract, with CSX or other entity, whereby it accepted liability for demurrage charges; (3) it was simply a geographical place where freight was either loaded or unloaded – it was neither the consignee nor shipper/consignor of the freight shipments, and never executed any contract designating it as the consignee or shipper/consignor for such freight; (4) it never authorized any consignee or shipper/consignor designation for the freight shipments; (5) it had no beneficial ownership of the freight through consignment or otherwise; (6) it did not have responsibility for or control over the volume of railcars that entered its facility; (7) it did not order empty railcars for its own transportation purposes; and (8) portions of the documents CSX produced during discovery established that CSX had notice of the final destinations and identities of the actual consignees and shipper/consignors at issue – none of which were Novolog.

In connection with its summary judgment submissions, CSX presented the district court with a compendium of different documents it had produced during discovery, including many pages of computer

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did not have any involvement in making the shipping arrangements or preparing the bills of lading.

spreadsheets, purporting to be supporting documentation reflecting the fact that Novolog was named as either the sole consignee or shipper on the bills of lading corresponding to the Incidental Bills.[10] Novolog contested the admissibility of these documents on various evidentiary grounds. Novolog also argued, *inter alia*, that these documents were not the actual waybills or bills of lading at issue.

After submission of various responses, replies, and sur-replies by the parties and oral argument, the district court issued a memorandum and order denying both parties' motions for summary judgment. App. 79. The district court – following, *inter alia*, authority established by the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") – rejected CSX's demurrage liability arguments.

The district court held that Novolog was not subject to demurrage liability pursuant to CSX's Tariff as it was not a party shipping or receiving under CSX's contracts for the transportation of the freight. It ruled that no industry-wide custom or statute imposed demurrage liability on a transloader such as Novolog merely by accepting freight for unloading or loading purposes as the unilaterally named consignee on bills of lading or by ordering cars

[10] CSX did not present any evidence in the district court proceeding that the bills of lading which purportedly correspond to the Incidental Bills were ever forwarded to Novolog upon their issuance or at any time, including any time prior to delivery of the freight to Novolog's facility.

as the named shipper. It further found that CSX's reliance on § 10743(a)(1) of the ICCTA, as a purported basis for imposition of liability on Novolog, was "misplaced." The district court found the statute relates only to the payment of rates for shipment of freight, not demurrage, and that demurrage charges are distinct from transportation rates. App. 56-75.

As a result, the district court declined to resolve the evidentiary issues raised by Novolog or to make a finding of fact as to whether Novolog was indeed named as the consignee or as the shipper on the relevant bills of lading. App. 46 n.6; *see also* App. 45 nn.3-5.

The district court stopped short of granting summary judgment in Novolog's favor because it concluded that there remained an issue of material fact as to whether a document entitled a "Refund Contract," that was the subject of Novolog's counterclaim against CSX, was a separate contractual agreement between Novolog and CSX that might subject Novolog to liability for demurrage. App. 75-76. Prior to trial, however, CSX filed an admission that "other than Novolog being the named consignee on bills of lading, and Novolog having accepted delivery of the loaded cars by CSX, CSX had no separate contractual relationship with Novolog governing the movement and/or disposition of the detained rail cars." App. 118-119. Following this admission, the district court entered judgment as a matter of law in favor of Novolog on CSX's claim. App. 80.

CSX then filed two motions for reconsideration and an alternative motion for referral to the United States Surface Transportation Board. The district court denied these motions. App. 81-84. CSX subsequently filed a timely appeal to the Third Circuit.

After the submission of briefs by the parties and an *amici curiae* brief by Norfolk Southern and BNSF Railway Companies in support of CSX's position on appeal, and oral argument, the Third Circuit issued an opinion whereby it vacated the district court's judgment and remanded this case to the district court for further proceedings as follows:

> We hold that the consignee-agent provision of the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10743(a)(1), governs this dispute as to the charges assessed against Novolog as the consignee of freight. Under this provision a transloader or other such entity, if named on the bill of lading as the sole consignee, is presumptively liable for demurrage charges arising from unloading delays, unless it accepts the freight as the agent of another and notifies the carrier of its status in writing prior to delivery. Because the factual record was not sufficiently developed, however, we cannot determine what the bills of lading showed here; thus we vacate the District Court's order granting judgment to the transloader as a matter of law and remand for further proceedings.

> With respect to the transloader's potential liability for demurrage charges in its role as the shipper (consignor) of freight, we refrain from announcing a holding because the question was not fully addressed or briefed, but we will vacate the District Court's grant of judgment on this claim as well and remand it for further consideration in light of our holding regarding consignee liability.

Novolog Bucks County, 502 F.3d at 250, App. 2-3.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE THIRD CIRCUIT AND THE SEVENTH CIRCUIT ON A DEMURRAGE LIABILITY ISSUE OF VITAL IMPORTANCE TO THE TRANSLOADING AND RAILROAD INDUSTRIES

The Rules of the Court advise that "a writ of certiorari will be granted only for compelling reasons" such as when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals in the same important matter[.]" Rule 10(a).

A. The Third Circuit Rendered a Decision in Conflict with a Recent Decision of the Seventh Circuit as to Whether a Transloader or Other Such Entity That Accepts Delivery of Freight Is Automatically Liable for Demurrage Charges under a Rail Carrier's Tariff in Absence of Compliance with § 10743(a)(1) of the ICCTA Merely Because a Third Party Unilaterally Lists it as the Consignee on a Bill of Lading

The Third Circuit's decision below is in conflict with a recent decision of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") on the same important matter, *i.e.*, whether § 10743(a)(1) of the ICCTA automatically applies to a transloader or other such entity (*e.g.*, a warehouseman or pier operator) – that is not a party to a rail carrier's transportation contract or any contract whereby it agrees to accept demurrage liability, has no beneficial ownership of the freight at issue, and does not authorize a consignee designation – merely because a third party unilaterally lists it as the consignee on a bill of lading and it accepts delivery of the freight. *Compare Novolog Bucks County*, 502 F.3d 247, App. 1-34 (circuit court of appeals vacated, on § 10743(a)(1) grounds, district court's grant of judgment as a matter of law against a rail carrier), *with Illinois Cent. R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003) (circuit court of appeals reversed district court's entry of summary judgment, on § 10743(a)(1) grounds, in favor of a rail carrier).

In *South Tec*, a printing company (Donnelley) had an agreement with a rail carrier (the Illinois Central Railroad) to transport paper from Donnelley's paper suppliers to the South Tec warehouse. There the paper was sorted and stored and the railcars released. When Donnelley needed the paper, it was loaded on other railcars or trucks and brought to the Donnelley facility. According to Donnelley's agreement with Illinois Central, the bills of lading should state simply that the car was "to stop at South Tec Warehouse. . . . Freight Charges Cover Shipments to Ultimate Destination." *Id.* at 814-15. Although the majority of the bills of lading named Donnelley as the consignee, there was a wide variation among the bills of lading, and a small percentage named South Tec as the consignee. *Id.* at 815, 821.

The district court in *South Tec* held (as the Third Circuit held in this case) that the South Tec warehouse was liable for the demurrage charges because it had failed to comply with the notification requirements of § 10743(a)(1). The Seventh Circuit disagreed with the district court's demurrage assessment, noting that it had apparently assumed that South Tec was indeed the consignee. *Id.* at 822. The Seventh Circuit determined that § 10743(a)(1) **"applies only to agents who are also consignees, and not to agents who are not consignees."** *Id.* at 817 (emphasis added). The Seventh Circuit reviewed the applicable law of agency and stated:

> We rejected, in *Evans Prods. [v. Interstate Commerce Comm'n]*, 729 F.2d [1107] at 1113-14 [7th Cir. 1984], the theory that the general rule of agency law that an agent that refuses to disclose the identity of its principal is personally liable for charges incurred on behalf of the principal, *see* Restatement (Second) of Agency § 321, permits railroads to broaden their tariffs to reach non-consignee agents. As the Restatement makes clear, this rule of law only applies where an agent is actually entering into a contract on behalf of the principal.

Id. at 820 n.5.

The Seventh Circuit also surveyed the existing law on demurrage and found no industry-wide custom which permitted the imposition of demurrage charges against non-consignees; as such, it determined that South Tec "would be liable only if it were a consignee or if it contractually assumed responsibility for the demurrage charges." *Id.* at 820. Finding no evidence that South Tec contractually assumed liability for demurrage, the Seventh Circuit analogized *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F. Supp. 880, 884 (N.D. Fla.) (where port was not party to the transportation contracts under which shipments to it were made, it could not be held liable for demurrage asserted under a rail carrier's tariff), *recon. denied*, 936 F. Supp. 880 (N.D. Fla. 1995) and *Southern Pac. Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154 (N.D. Cal. 1974) (unilateral listing as consignee on bills of lading "was not enough to make Matson a

party to the transportation contract and liable for demurrage") and concluded that the unilateral designation of a party as consignee on bills of lading, without more, is not sufficient to make the party legally a consignee and, thus, liable for demurrage charges. *Id.* at 821-22 (citing *Evans Prods.*, 729 F.2d at 113 ("No liability exists merely on account of being named in the bill of lading, or handling the property.")).

As a result, the Seventh Circuit remanded the case to the district court "to determine who was the legal consignee (or consignees) of the paper shipments in question and presumably liable for the demurrage charges" and encouraged the district court to "consider whether [South Tec] contractually assumed responsibility for the demurrage charges." *Id.* at 822.

Expressly rejecting the Seventh Circuit's reasoning in *South Tec*, the Third Circuit held below:

> we decline to follow the Court of Appeals for the Seventh Circuit's recent conclusion in a similar case that the entity listed as the consignee on the relevant bills of lading was not, without more, the legal consignee under Section 10743. *See South Tec*, 337 F.3d at 821. *See also Union Pacific Railroad Co. v. Carry Transit*, No. 3:04-CV-1095-B (N.D. Tex. Oct. 27, 2005) (following *South Tec*).

Novolog Bucks County, 502 F.3d at 259, App. 25.

The Third Circuit, rejecting Novolog's arguments that it was not the legal consignee of the freight at

issue, also opined that the Seventh's Circuit's decision in *Evans Prods.* (cited with approval by the Seventh Circuit in *South Tec* and by the district court below in this case) was distinguishable because it involved a repair facility, and thus, was not "particularly instructive." *Id.* at 262 n.14, App. 31.

Since the Third Circuit rendered a decision in conflict with Seventh Circuit on a matter of vital importance to the transloading and railroad industries, among others, there is a compelling reason for the Court to grant a writ of certiorari in this case. As the Third Circuit acknowledged, two recent district court decisions used a demurrage analysis similar to that of the district court below.

The United States District Court for the Northern District of Texas followed the Seventh's Circuit's holding in *South Tec*. *See Carry Transit*, No. 3:04-CV-1095-B (App. 85-102) (transloader, that did not authorize shippers to list it as a consignee on bills of lading, not liable for rail carrier's demurrage charges by failing to provide notice of agency under § 10743(a)(1) because unilateral action by shippers in labeling it as consignee on such documents did not render it the consignee within the meaning of the statute). Additionally, prior to the Third Circuit's decision in this case, the United States District Court for the Western District of Pennsylvania, citing the district court's decision below, held that no demurrage liability could attach under CSX's Tariff against a custom injection molder that received shipments of plastic resin *via* CSX railcars because: "[t]he designation as consignee in the bills of

lading, without more, is insufficient to create liability under a tariff because '[a] tariff is an inappropriate instrument to legislate liability with respect to a nonconsenting party . . . '" *CSX Transp., Inc. v. Port Erie Plastics, Inc.*, No. 05-CV-139, 2006 WL 2847414, *4 (W.D. Pa. Sept. 29, 2006) (citing *Novolog Bucks County*, 2006 WL 1451280 and quoting *Middle Atlantic Conference v. United States*, 353 F. Supp. 1109, 1122 (D.D.C. 1972)).[11]

The current conflict between the demurrage decisions of the Third Circuit and the Seventh Circuit should be resolved to provide uniformity of the law across the nation with respect to the applicability or non-applicability of a rail carrier's demurrage tariff to a transloader such as Novolog and other similarly situated entities.

B. The Court Should Reverse the Third Circuit's Decision Below and Mandate the Application of the Seventh Circuit's Demurrage Analysis

The Third Circuit's decision below is inherently inequitable to Novolog and other similarly situated entities, and thus, fails to serve the interests of justice. This fact provides the Court with another compelling reason to grant a writ of certiorari in this case.

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[11] The *Port Erie Plastics* case is currently on appeal to the Third Circuit at docket number 06-4546.

The Third Circuit – rejecting Novolog's argument that it is inequitable to allow the shipper's unilateral and unauthorized designation of a transloader as the consignee to control the demurrage liability issues – concluded that no unfairness results from applying § 10743(a)(1)'s plain language to Novolog because under the statutory scheme, Novolog could avoid liability for demurrage in two ways: first, by refusing the freight; and second, by providing the carrier timely written notice of agency under § 10743(a)(1), if appropriate. *Novolog Bucks County*, 502 F.3d at 259, App. 24. This reasoning is inherently flawed for several reasons.

First, it is uncontested that Novolog had no part in the preparation of the bills of lading. There is no evidence that CSX or the shippers (who, according to CSX, prepared the bills of lading) ever forwarded the relevant bills of lading corresponding to the Incidental Bills to Novolog upon their issuance or at any time prior to delivery of the freight to Novolog's facility. Further, the district court expressly rejected CSX's arguments that Novolog knew the steel at issue was inbound before it arrived and had specific instructions from shippers on how to handle the steel freight.

Thus, as the record reflects, Novolog had no knowledge that the shippers incorrectly designated it as the "consignee" as opposed to the "care of" party on the purported bills of lading or that the steel was inbound to its facility before it arrived. In this situation, Novolog would be unable to provide CSX with

notice of its "care of" status along with "the name and address of the beneficial owner of the property if it [was] reconsigned or diverted to a place other than the place specified in the original bill of lading" before the delivery of the freight to its facility. As such, the Third Circuit's § 10743(a)(1) analysis – in contrast with the Seventh Circuit's (which mandates a thorough review of whether the intermediary is actually the legal consignee) – compels a "no-win" situation for all entities such as Novolog; it places their liability for demurrage charges exclusively within the shippers' control.[12]

Second, the Third Circuit's decision below – in contrast with the Seventh Circuit's decisions in *South Tec* and *Evans Prods.* – illogically puts the consequences of the failure to list the intermediary correctly on bills of lading as the "care of" party as opposed to the consignee, on the intermediary, instead of on the shippers, the entities who actually prepared the bills of lading, or on the rail carrier that had contracts with the shippers for the transportation of the freight.

In this case, Novolog had no control over the unilateral and unauthorized decision by the shippers to list it as the consignee on purported bills of lading,

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[12] It is a fundamental tenet of contract law that parties to a contract cannot bind a nonparty, such as Novolog, to its terms. *See Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty.").

but CSX had recourse under its tariff (which was incorporated in the transportation agreements between CSX and these shippers) to impose any requisite demurrage charges upon its shipper-customers. As the district court aptly stated below, CSX was not without recourse because it "may pursue its claim for demurrage against another party with which it did have a contractual relationship relating to the movement or handling of these railcars." App. 75. *See also Carry Transit*, No. 3:04-CV-1095-B ("[T]he Court finds that while Union Pacific may have a cause of action against shippers who named Carry Transit as the consignee in the bills of lading, they do not have a cause of action against Carry Transit."). App. 114.

Third, the terms of CSX's Tariff indicate that its application extends only to CSX's customers. *See* CSX's Tariff "Demurrage Provisions" and Application Item 8000. App. 85. Novolog is not one of CSX's customers and should not be bound by the demurrage provisions of CSX's Tariff.

Finally, portions of the documents CSX produced during discovery in the district court proceeding established that CSX had notice from Novolog of the final destinations and identities of the actual consignees and shipper/consignors – none of which were Novolog. The district court rendered the following finding of fact on this issue:

> Confusingly, the only legible and comprehensible portions of the supporting documentation appear to be created by Novolog. These

> documents show the port of origin to be "Fairless, PA (Shared Assets)," the shipper to be various steel companies, the consignee to be various other steel companies at various destinations, and the route to be via CSX.

App. 44 n.2.

Accordingly, the Seventh Circuit's analysis in *South Tec* and *Evans Prods.* of an intermediary's potential demurrage liability is not only in conformity with the existing body of demurrage law, but is inherently more equitable than the Third Circuit's flawed analysis. Hence, the Court should reverse the Third Circuit's decision below.[13]

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[13] Although the Third Circuit refrained from announcing a holding with respect to Novolog's potential liability for demurrage charges in its alleged role as the shipper/consignor of freight, it improperly remanded this issue for further consideration in light of its flawed consignee-liability holding. Based on the evidentiary record of this case, and the existing body of demurrage law, the Third Circuit should have affirmed the district court's entry of judgment as a matter of law in Novolog's favor for all the shipments of freight at issue, including those for which CSX alleged Novolog was the shipper/consignor.

II. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE THIRD CIRCUIT AND THE SEVENTH CIRCUIT AS TO WHETHER § 10743(a)(1) OF THE ICCTA APPLIES TO THE ASSESSMENT OF DEMURRAGE CHARGES

The district court below held that § 10743(a)(1) of the ICCTA "relates only to the payment of rates for shipment of freight not demurrage and . . . demurrage charges are distinct from transportation rates." App. 61. Although CSX argued on appeal that this holding by the district court was incorrect, it previously stated in its motion for summary judgment that:

> Demurrage charges are not part of the rate charges by the rail carrier to transport the freight; courts have consistently recognized a distinction between the freight transportation charges and "incidental charges," including rail car demurrage[.] *Delaware and Hudson Railway Co., Inc. v. Offest Paperback Mfrs., Inc.*, 126 F.3d 426 (2d Cir. 1997) (citing numerous cases, including *ICC v. Oregon Pac. Indus., Inc.*, 420 U.S. 184, 190 n.7 (1975)).

CSX's Mot. Sum. Judg. at 7 n.1 (emphasis added).

The Third Circuit below disagreed with the district court's interpretation of § 10743(a)(1); it stated:

> Although to our knowledge no court has spoken directly to the applicability of Section 10743(a)(1) to demurrage rates, both the

> former ICC and a three-judge panel of the District Court for the District of Columbia, faced with a substantially identical provision applicable to motor carriers, have also found it applicable to detention (i.e., demurrage) charges. *In Payment for Detention Charges, Eastern Central States*, 335 I.C.C. 537 (I.C.C. 1969), the agency relied in part on Section 223 of the ICC Act, 49 U.S.C. § 323 (1964), to decide whether a trucking association's tariff was unlawful. The ICC held without hesitation that the phrase "transportation charges in respect to the transportation of . . . property" in that provision "of course [ ] would encompass charges for demurrage or detention of vehicles. . . . While detention charges have a purpose different from that of freight charges, . . . demurrage charges are part of the total transportation charges." *Payment for Detention Charges*, 335 I.C.C. at 539-40. Upon review, a three-judge panel of the District Court for the District of Columbia agreed with the ICC, writing that the term "transportation charges" in Section 223 of the ICC Act "may include detention charges." *Middle Atl. Conference v. United States*, 353 F. Supp. 1109, 1121 n.34 (D.D.C. 1972).

Novolog Bucks County, 502 F.3d at 256, App. 17-18.

Seventh Circuit precedent (more recent than the ICC's 1969 *Payment for Detention Charges* and the United States District Court for the District of Columbia's 1972 *Middle Atlantic Conference* decisions relied upon by the Third Circuit), is contrary to the

Third Circuit's holding. In 1981, the Seventh Circuit interpreted a predecessor of the current § 10743(a)(1) as not applying to detention charges. *Blanchette v. Hub City Terminals*, 683 F.2d 1008, 1011 (7th Cir. 1981). In *Blanchette*, the Seventh Circuit held: "[t]he purpose of [49 U.S.C. § 3.2 (1976)] was to relieve from liability agent-consignees who paid in full carriers' initial bills, which the carrier later discovered were lower than the rate required by the tariff." *Id.*[14]

The Third Circuit declined to follow *Blanchette* and held that demurrage rates are "rates for transportation" under § 10743(a)(1). *Novolog Bucks County*, 502 F.3d at 257 n.9, App. 18-19. Therefore, since the Third Circuit rendered a decision in conflict with Seventh Circuit on this matter of vital importance to the transloading and railroad industries, among others, another compelling reason exists for the Court to grant a writ of certiorari in this case.

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[14] The Seventh's Circuit's decision in *South Tec* is not inconsistent with its decision in *Blanchette*. In *South Tec*, the Seventh Circuit made no ruling on whether the terms "rates for transportation" in § 10743(a)(1) included demurrage charges. Rather, the *South Tec* court: (1) concluded that district court erred by holding a warehouse liable for demurrage charges simply for non-compliance with § 10743(a)(1)'s consignee-agent notification provisions; and (2) instructed the district court to review the record for evidence of whether the warehouse contractually assumed liability for demurrage charges and was the legal consignee for the paper shipments at issue. 337 F.3d at 822.

CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the decision of the Third Circuit below.

Respectfully submitted,

CONRAD O. KATTNER
Counsel of Record
FREDERICK A. TECCE
McShea\Tecce, P.C.
1717 Arch Street, 28th Floor
Philadelphia, PA 19103
(215) 599-0800

Counsel for Petitioner

Dated: December 4, 2007

502 F.3d 247

United States Court of Appeals,
Third Circuit.
CSX TRANSPORTATION COMPANY, Appellant
v.
NOVOLOG BUCKS COUNTY.
No. 06-3431.

Argued on July 12, 2007.
Filed: Sept. 5, 2007.
As Amended Sept. 14, 2007.

Paul D. Keenan, Esquire (Argued), Charles L. Howard, Esquire, Keenan, Cohen & Howard, P.C., Philadelphia, PA, for Appellant, CSX Transportation, Inc.

Frederick A. Tecce, Esquire (Argued), McShea Tecce, P.C., Philadelphia, PA, for Appellee, Novolog Bucks County.

John K. Fiorilla, Esquire (Argued), Capehart Scatchard, P.A., Mount Laurel, NJ, for Amici Curiae, Norfolk Southern Railway Company and BNSF Railway Company.

Before: SLOVITER, ALDISERT and ROTH, Circuit Judges.

OPINION

ROTH, Circuit Judge:

This appeal concerns the liability of entities such as warehousemen, pier operators, transloaders, and

connecting carriers for demurrage charges, *i.e.*, penalties assessed by railroads when shippers or recipients of freight do not timely return railcars to service after loading or unloading. The railroad in this case sought to assess demurrage charges against a transloader for delays in returning both inbound and outbound railcars to service. With respect to inbound freight, the transloader received loaded railcars on behalf of steel companies or others and forwarded the steel by ship toward mostly foreign destinations; with respect to outbound freight, it ordered empty railcars, which it then loaded with steel for transportation by the railroad to domestic destinations. The transloader objected to the assessment, arguing that it could not be subjected to charges under an agreement – namely, the transportation contract – to which it was not a party.

We hold that the consignee-agent provision of the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10743(a)(1), governs this dispute as to the charges assessed against Novolog as the consignee of freight. Under this provision a transloader or other such entity, if named on the bill of lading as the sole consignee, is presumptively liable for demurrage charges arising from unloading delays, unless it accepts the freight as the agent of another and notifies the carrier of its status in writing prior to delivery. Because the factual record was not sufficiently developed, however, we cannot determine what the bills of lading showed here; thus we vacate the District Court's order

granting judgment to the transloader as a matter of law and remand for further proceedings.

With respect to the transloader's potential liability for demurrage charges in its role as the shipper (consignor) of freight, we refrain from announcing a holding because the question was not fully addressed or briefed, but we will vacate the District Court's grant of judgment on this claim as well and remand it for further consideration in light of our holding regarding consignee liability.

Finally, we hold that the District Court did not abuse its discretion when it refused to refer an issue to the Surface Transportation Board (STB), where the party moving for referral did not invoke the doctrine of primary jurisdiction until after the District Court had already decided the issue and the question was not one on which the expertise of the STB was not crucial to the decision.

I. *Factual and Procedural Background*

The parties in this litigation are businesses engaged in the interstate transportation of freight. CSX Transportation, Inc. ("CSX") is a rail common carrier; Novolog Bucks County ("Novolog") is a private port with access to a rail-served industrial facility on the Delaware River.

As relevant here, the Novolog port functioned as a transfer point for the import, export, and domestic transportation of steel. Following instructions from

various steel companies, CSX delivered to Novolog railcars loaded with steel, which Novolog unloaded and transferred onto other means of transportation. In addition, when Novolog so requested, CSX placed empty railcars at Novolog's disposal for loading with imported steel and transportation to domestic destinations. Novolog did not have an ownership interest in any of the shipments at issue here, but rather received and forwarded cargo on behalf of others and on their instructions.

According to CSX's Tariff, a person receiving its railcars for unloading, or ordering empty railcars for loading, had two days to do so and return the cars to service; if the cars were kept beyond this time, demurrage charges would be assessed.[1] In particular, CSX's Tariff Item 8070-G provided that "[u]nless

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[1] Demurrage is "a charge exacted by a carrier from a shipper or consignee on account of a failure to load or unload cars within the specified time prescribed by the applicable tariffs. Railroads charge shippers and receivers of freight 'demurrage' fees if the shippers or receivers detain freight cars on the rails beyond a designated number of days." *Union Pacific Railroad Co. v. Ametek, Inc.*, 104 F.3d 558, 559 n. 2 (3d Cir.1997) (internal quotations and citation marks omitted).

Under prior statutory regimes, railroads' tariffs, including tariffs regarding demurrage charges, had to be filed with the Interstate Commerce Commission (ICC). After the enactment of the Interstate Commerce Commission Termination Act (ICCTA) in 1996, the Interstate Commerce Commission was replaced with the Surface Transportation Board (STB) and filing of tariffs was no longer required. CSX's Tariff 8100 is published by CSX on its web site and specifically incorporated into all its transportation agreements.

otherwise advised [,] consignor at origin or consignee at destination will be responsible for the payment of demurrage rates."

During the early part of 2003, fluctuations in the price of steel caused a significant increase in the amount of steel delivered for export to the Novolog facility. As a result, Novolog was unable to perform loading and unloading operations within the two-day time frame established by the Tariff, and CSX began charging Novolog demurrage fees, which totaled $260,304 by August, 2003. Novolog refused to pay, arguing it was not liable for demurrage since it was not a party to the bills of lading or other contracts regarding the shipments at issue and had no responsibility for or control over the volume of railcars that entered its facility.[2] CSX then brought this action in the Eastern District of Pennsylvania seeking payment of the demurrage charges, with interest, and attorney fees. It argued that Novolog was liable under the tariff because it was listed in the bills of lading either as the sole consignee for the freight (where the

[2] A bill of lading is "the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers." *S. Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982) (internal citation omitted).

charges arose from unloading delays) or as the shipper (where the charges arose from loading delays).[3]

After discovery the parties filed cross-motions for summary judgment. CSX submitted documents appearing to show that in each of the instances for which CSX assessed demurrage charges against Novolog for delays in unloading, Novolog was listed as the sole consignee on the waybills, without any limiting designations such as "care of" or "account of," and in each of the instances for which CSX assessed demurrage charges against Novolog for loading delays, Novolog was listed as the shipper on the waybills.[4] In addition CSX presented to the District Court many pages of computer spreadsheets purporting to reflect the fact that Novolog was named as either the consignee or the shipper on the corresponding bills of lading.

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[3] Novolog filed a counterclaim, on which it eventually prevailed at trial. The counterclaim has no relevance to the issues before us.

[4] A waybill is a "[w]ritten document made out by [the] carrier listing point of origin and destination, consignor and consignee, and describing goods included in shipment. . . ." *Black's Law Dictionary* 1429 (5th ed.1979). According to the Sixth Circuit Court of Appeals, "the bill of lading is a title document, while the waybill describes the freight, its route, and the carriers involved in its shipment. The waybill accompanies the freight throughout the shipment and into the hands of the destination carrier." *Missouri Pacific R. Co. v. Escanaba and Lake Superior R. Co.*, 897 F.2d 210, 211 (6th Cir.1990). The record does not clarify what significance, if any, the parties ascribe to the different role played by the waybills and the bills of lading that accompanied the shipments at issue.

Novolog contested the admissibility of the documents presented by CSX and argued they were not actual bills of lading. It also submitted the deposition of David Reid, the CEO of Novolog during the relevant period, who testified that Novolog had not given permission to be listed as consignee for the freight in the railcars at issue and had not created or executed any of the bills of lading for the shipments that resulted in demurrage charges.

On May 24, 2006, the District Court denied both parties' summary judgment motions regarding the demurrage dispute. The court rejected CSX's theory that Novolog became subject to liability by accepting freight as the named consignee on the bills of lading or by ordering cars as the named shipper; it therefore declined to resolve the evidentiary issues or to make a finding of fact as to whether Novolog was indeed named as the consignee or as the shipper in the bills of lading. *See CSX Transp. v. Novolog Bucks County*, No. 04-CV-4018, 2006 WL 1451280, at *3 n. 3-5, *4 n. 6 (E.D.Pa. May 24, 2006). It held, however, that summary judgment was inappropriate because there remained an issue of material fact as to whether Novolog had entered a separate contractual agreement with CSX that might make it liable to the charges.

Following the issuance of the opinion denying the cross-motions for summary judgment, CSX filed an admission that "other than Novolog being the named consignee on bills of lading, and Novolog having accepted delivery of the loaded cars by CSX, CSX had

no separate contractual relationship with Novolog governing the movement and/or disposition of the detained rail cars." As a result the District Court entered judgment as a matter of law in favor of Novolog on July 12, 2006.

CSX then filed a motion for reconsideration and an alternative motion for referral to the STB. The District Court denied the motion for reconsideration as untimely and denied the motion for referral "because [its] memorandum and order of May 24, 2006 [was] not tantamount to an attack upon the reasonableness of the tariff terms." CSX filed this timely appeal.

II. *Discussion*

A. Jurisdiction

We have jurisdiction of this appeal from a final order of the District Court under 28 U.S.C. § 1291. The District Court had diversity jurisdiction under 28 U.S.C. § 1332 and federal question jurisdiction under 28 U.S.C. § 1337 over a cause of action arising under the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*

Although the subject matter jurisdiction of the District Court is not in question, before we turn to the merits we must address CSX's contention that the District Court, in rendering its decision, usurped the primary jurisdiction of the STB. CSX urges that in holding that it could not exact demurrage charges

from parties such as Novolog, the District Court implicitly declared its tariff unreasonable, a determination reserved statutorily to the STB. *See* 49 U.S.C. § 10702 (mandating that rail carriers shall establish reasonable rates, rules, and practices); 49 U.S.C. § 10704.

The District Court refused to refer the matter to the STB on the grounds that its decision did not amount to a finding that CSX's rates were unreasonable. On appeal, CSX argues that although the District Court's opinion may not have expressly held CSX's demurrage tariff unreasonable, it nonetheless "gutted it and rendered it ineffective." Novolog responds that CSX's motion for conditional referral was untimely because it was filed beyond the time limit provided for motions for reconsideration and that in any event it lacks substantive merit. A district court's decision not to submit an issue for initial determination by an administrative agency is reviewed for abuse of discretion. *Puerto Rico Mar. Shipping Auth. v. Valley Freight Sys.*, 856 F.2d 546, 549 (3d Cir.1988).

Primary jurisdiction "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. . . ." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956). In such cases, courts may refer specific questions to the administrative body charged with their resolution. *See* 28 U.S.C. § 1336 (district

courts may refer an action to the Surface Transportation Board for determination.) Unlike objections to subject matter jurisdiction, which can be raised at any point, primary jurisdiction arguments can be waived. *Baltimore & Ohio Chicago Terminal R.R. v. Wisconsin Cent. Ltd.*, 154 F.3d 404, 411 (7th Cir.1998); *see also Northwest Airlines v. County of Kent*, 510 U.S. 355, 366 n. 10, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994) (declining to invoke the primary jurisdiction doctrine where the parties had not raised the issue). Primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *W. Pac. R.R. Co.*, 352 U.S. at 63, 77 S.Ct. 161. It does not strictly limit the power of the courts, but rather is intended to "serve as a means of coordinating administrative and judicial machinery and to promote uniformity and take advantage of the agencies' special expertise." *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 205 (1st Cir.2000).

No coordination would be achieved by requiring a District Court, *after* it has rendered a judgment, to vacate that judgment upon motion and refer a question it has already decided to an agency. CSX could have filed a petition for declaratory action with the STB once it became clear that Novolog was contesting the charges or could have raised the issue of primary jurisdiction at any time during the preliminary phases of the litigation. Instead it chose to wait until judgment had been entered, and then requested a second bite at the apple. In addition, the STB's expertise, while

helpful, would not have been crucial to the determination of the issues here, which involve the analysis of precedent and statutory interpretation. We therefore hold that the District Court did not abuse its discretion in denying CSX's motion for conditional referral to the STB.[5]

B. Liability for demurrage charges of a named consignee that accepts freight

The most important and vigorously argued issue in this case is whether a transloader or connecting carrier such as Novolog can become subject to liability for demurrage charges by being listed as the consignee in a bill of lading and accepting delivery of the freight listed therein, even if it does not have a beneficial interest in the freight and has not authorized the shipper or the carrier to list it as the consignee. The District Court held, as a matter of law, that it cannot. We review its judgment *de novo*. *A.W. v. Jersey City Public Schools*, 486 F.3d 791, 794 (3d Cir.2007).

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[5] Our opinion in *MCI Telecomms. v. Teleconcepts*, 71 F.3d 1086 (3d Cir.1995), is not to the contrary. There we held that the doctrine of primary jurisdiction mandated referral of a question requiring the interpretation and application of a local telephone company's tariff to the Pennsylvania Public Utilities Commission (PUC). We based that decision on the nature of the question to be decided, which the Pennsylvania Supreme Court had held to be one peculiarly within the special expertise of the PUC. The same deference is unnecessary here.

The District Court held, first, that whether or not Novolog was in fact listed as the sole consignee in the bills of lading, that unauthorized and unilateral designation was not sufficient to make it a legal consignee for purposes of imposing demurrage liability. *CSX*, 2006 WL 1451280, at *8, *11[6] Second, the District Court dismissed CSX's argument that Novolog was liable as the agent of an undisclosed consignee principal, since "this rule of law only applies where an agent actually is entering into a contract on behalf of the principal." *Id.* at *9. Third, the District Court held that Novolog was not liable for demurrage under the statutory terms of ICCTA's consignee-agent liability provision, 49 U.S.C. § 10743(a)(1) (providing for liability of consignee-agents who do not notify carrier of agency relationship), since that section "relates only to the payment of rates for shipment of freight not demurrage and . . . demurrage charges are distinct from transportation rates." *Id.* at *10. Finally, the District Court rejected CSX's argument that Novolog's knowledge of the industry practices, its acceptance of notices that railcars had been delivered,

[6] As mentioned, the District Court initially held that a genuine issue of material fact remained as to whether a separate contract between Novolog and CSX, known in the litigation as the Refund Contract, constituted a contractual agreement regarding the railcars that could subject Novolog to liability for demurrage charges. That issue was subsequently resolved by CSX's admission that it did not. With the last issue of material fact eliminated, the District Court then granted judgment as a matter of law for Novolog.

and its requests for railcars confirmed that it was the legal consignee or consignor of the shipments.

We hold that recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another and comply with the notification procedures established in ICCTA's consignee-agent liability provision, 49 U.S.C. § 10743(a)(1).

We take as our starting point two well-established and oft-repeated principles. The first is that liability for freight charges, including demurrage charges, may be imposed against a consignor, consignee, or owner of the property, or on others by statute, contract, or prevailing custom. *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse*, 337 F.3d 813, 820 (7th Cir.2003) (internal quotation marks and citation omitted); *Middle Atl. Conference v. United States*, 353 F.Supp. 1109, 1118 (D.D.C.1972) (three-judge panel). The second is that the consignee becomes a party to the transportation contract, and is therefore bound by it, upon accepting the freight; thus it is subject to liability for transportation charges even in the absence of a separate contractual agreement or relevant statutory provision. *See Louisville & Nashville Ry. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 70, 44 S.Ct. 441, 68 L.Ed. 900 (1924) ("if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later"); *Erie R. Co. v. Waite*, 62

Misc. 372, 114 N.Y.S. 1115 (1909) (demurrage may be imposed upon consignees independently of statute or express contract); *Gage v. Morse*, 12 Allen 410, 90 Am. Dec. 155, 1866 WL 6378 (Mass.1866) ("[i]f the consignee will take the goods, he adopts the contract").[7]

Historically the principle governing the liability of parties named as consignees in the bill of lading was a simple one of notice. In general "a consignee as such under a straight bill of lading [was] liable [because] treated as presumptive owner and co[mpelled] to pay." *In re Tidewater Coal Exch.*, 292 F. 225, 234 (S.D.N.Y.1923) (Hand, J.). However, if the consignee was "known [by the carrier] not to be the owner" but a mere "factor" or agent, the consignee was not liable for demurrage. *Id.* The carrier might have notice of the relationship because the bill of lading included language such as "care of" or "account of," or might simply know of the agency through long dealing even if the bill of lading failed to disclose it. *Id.* at 233-34. In either case, the principal rather than the agent would be liable. *Id.*

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[7] The status of owners is somewhat more complex and not relevant here since the parties agree that Novolog did not have a beneficial interest in the cargo. *See, e.g., Wheaton Van Lines, Inc. v. Gahagan*, 669 A.2d 745, 749 (Me.1996) ("consignee" defined to include "an owner of shipped goods who is identified to the carrier as the intended recipient of the goods, who does in fact accept the goods not as an agent but for itself, and who in every way but designation on a bill of lading acts as a consignee.")

These common law principles are reflected in ICCTA's consignee-agent liability provision, titled "Liability for payment of rates," which provides in relevant part:

> Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it *to a consignee that is an agent only*, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but *not for additional rates that may be found to be due after delivery* if the consignee gives *written notice* to the delivering carrier *before delivery of the property* –
>
> (A) *of the agency and absence of beneficial title*; and
>
> (B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10743(a)(1) (emphasis added).

This section appears designed to address precisely the case before us, namely, the situation where a carrier assesses charges after delivery against the named consignee and recipient of the freight, but the

consignee/recipient contests its liability for the charges on the grounds that it is a mere middleman. Building on the common law, it adopts the principle that the named consignee becomes a party to the transportation contract upon receipt of the freight and is thereafter liable for all relevant charges, whether immediately due or arising after delivery, unless the consignee is an agent and the carrier has notice of this. It adds precision to the common law tradition, however, by clearly laying out what a named consignee/recipient must do to avoid liability on the grounds that it is an agent. The requirements are not burdensome: the consignee is obligated merely to notify the carrier, in writing, of the agency relationship.

Novolog, however, disputes that this section is applicable to this case. It argues, first, that Section 10743 applies to "rates for transportation," which do not include demurrage charges. Second, it contends that it is not a consignee merely by dint of being so designated, without its consent, on the bills of lading, and therefore the section cannot apply to it. We disagree.

First, we need not stray far to discover what the provision means by "rates for transportation," since the statute itself contains a definition section. As used in ICCTA, "'transportation' includes":

> (A) a locomotive, *car, vehicle*, vessel, warehouse, wharf, pier, dock, yard, property, facility, *instrumentality, or equipment of any kind*

> related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property. . . .

49 U.S.C. § 10102(9) (emphasis added). There can be little question that railcars – as cars, vehicles, instrumentalities, or equipment related to the movement of property by rail – are encompassed by this definition.

Although to our knowledge no court has spoken directly to the applicability of Section 10743(a)(1) to demurrage rates, both the former ICC and a three-judge panel of the District Court for the District of Columbia, faced with a substantially identical provision applicable to motor carriers, have also found it applicable to detention (*i.e.*, demurrage) charges. In *Payment for Detention Charges, Eastern Central States*, 335 I.C.C. 537 (I.C.C.1969), the agency relied in part on Section 223 of the ICC Act, 49 U.S.C. § 323 (1964), to decide whether a trucking association's tariff was unlawful. The ICC held without hesitation that the phrase "transportation charges in respect to the transportation of . . . property" in that provision "of course [] would encompass charges for demurrage or detention of vehicles. . . . While detention charges have a purpose different from that of freight charges, . . . *demurrage charges are part of the*

total transportation charges." Payment for Detention Charges, 335 I.C.C. at 539-40 (emphasis added).[8] Upon review, a three-judge panel of the District Court for the District of Columbia agreed with the ICC, writing that the term "transportation charges" in Section 223 of the ICC Act "may include detention charges." *Middle Atl. Conference v. United States*, 353 F.Supp. 1109, 1121 n. 34 (D.D.C.1972).[9] We thus hold

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[8] There is no substantive difference between the terms "transportation charges" and "rates for transportation" in the statute. *See* Historical and Revision Notes to 49 U.S.C. § 10744 (1982) ("[t]he word 'rates' is substituted for 'charges' for consistency in view of the definition of 'rate' in section 10102 of the revised title").

[9] In 1981, the Court of Appeals for the Seventh Circuit interpreted a predecessor of our current Section 10743 as not applying to detention charges. In *Blanchette v. Hub City Terminals*, 683 F.2d 1008 (7th Cir.1981), it wrote that "[t]he purpose of [49 U.S.C. § 3.2 (1976)] was to relieve from liability agent-consignees who paid in full carriers' initial bills, which the carrier later discovered were lower than the rate required by the tariff." *Id.* at 1011. Although this is clearly one of the purposes of the provision, it by no means excludes its applicability to other kinds of charges that can arise after delivery. Thus we decline to so limit its reach.

We also note that our opinion in *Baltimore & Ohio Chicago Terminal R.R. Co. v. United States*, 583 F.2d 678, 690-91 (3d Cir.1978), does not govern. There we held that the provisions of the then-current statute prohibiting rebates did not invalidate a proposed regulatory scheme by which the carrier was obligated to remit a certain portion of the billed demurrage charges to the actual owner of the rail car: these provisions (the then-current 49 U.S.C. § 15(15) and 41(1)) did not regulate demurrage charges, since the latter were "car service regulation[s]" as opposed to transportation rates and charges as those terms were used in the provisions at issue. Our decision was based on an

(Continued on following page)

that demurrage rates are "rates for transportation" under Section 10743.

Having determined that ICCTA's consignee-agent notification provision applies to the assessment of demurrage charges, we must decide whether it automatically applies to entities that are named as consignees on the bills of lading or whether more is required to turn such entities into "legal consignees" subject to it.

Novolog argues that the shipper's or carrier's unilateral decision to designate Novolog as the consignee, without Novolog's permission and where Novolog is not the ultimate consignee of the freight, cannot establish its status as a consignee for purposes of demurrage liability under the statute or otherwise. We disagree for three reasons. First, nothing in the statutory language suggests that it intends to restrict the term "consignee" to the ultimate consignee of the freight or use it to mean anything other than the person to whom the bill of lading authorized delivery and who accepts that delivery. Second, to hold that the documented designation of an entity as a consignee and that entity's acceptance of the freight is insufficient to hold it presumptively liable for demurrage charges would frustrate the plain intent of the statute, which is to establish clear, easily enforceable rules for liability. And third, to the

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analysis of the intent of the particular provisions at issue and does not affect our interpretation of a different provision here.

extent that Novolog's suggests that it would be inequitable to treat the named consignee as presumptively liable, that argument is unpersuasive.[10]

As always, the starting point for interpreting a statute is the language of the statute itself. *Hallstrom v. Tillamook County*, 493 U.S. 20, 25, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989). Unlike with the phrase "rates for transportation," ICCTA does not define the term "consignee" or its cognates. It is a fundamental canon of statutory construction, however, that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979). In common usage, the term means nothing more than the person to whom cargo is delivered following instructions. *See Webster's Third New International Dictionary* (1971) (defining "consignee" as "one to whom something is consigned or shipped"); *Black's Law Dictionary* (6th ed. 1990) (defining "consignee" as "[o]ne to whom a consignment is made [; p]erson named in bill of lading to whom or to whose order the bill promises delivery; [i]n a commercial use, . . . one to whom a consignment may be made, a person to whom goods are shipped for sale, or one to whom a carrier may lawfully make delivery in accordance with his contract of carriage,

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[10] It goes without saying that Novolog's lack of ownership of the freight is immaterial, since the provision is specifically directed at consignees "not having beneficial title to the property." 49 U.S.C. § 10743(a)(1).

or one to whom goods are consigned, shipped, or otherwise transmitted"). There is simply no reason to read the word "consignee" in section 10743 as having the more restricted meaning of ultimate consignee.[11]

The statutory language also fails to support the contention that an entity can be considered a consignee for demurrage purposes only when it has consented to the designation in the bill of lading. Indeed, the statute envisages specifically the situation where "*the shipper or consignor* instructs the rail carrier transporting the property to deliver it to a

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[11] Again, we agree with the *Middle Atlantic Conference* court's analysis of a substantially identical provision in the part of the statute dealing with motor carriers. The court wrote that Section 223 of the Interstate Commerce Act, 49 U.S.C. § 323 (1964),

> is addressed essentially at the problem *of the warehouseman, carrier, etc.*, who, while acting as agent for an undisclosed principal, *appears as consignee on the bill of lading*. . . . [W]ith respect to "transportation charges" (which may include detention charges), the statute provides that a consignee might escape that obligation if certain conditions of notice are satisfied.

Middle Atl. Conference, 353 F.Supp. at 1121 n. 34 (emphasis added).

Although we do not rely on them for primary guidance, we also note that both the Uniform Commercial Code and the Federal Bills of Lading Act define "consignee" in a manner consistent with our interpretation. *See* U.C.C. § 7-102(3) (" 'Consignee' means a person named in a bill of lading to which or to whose order the bill promises delivery"); 49 U.S.C. § 80101(1) (1994) ("consignee" is "the person named in a bill of lading as the person to whom the goods are to be delivered").

consignee that is an agent only," 49 U.S.C. § 10743(a)(1) (emphasis added), *i.e.*, where the person designated by the shipper or consignor as the consignee is *not* in fact the person who would normally be responsible for the charges, but is only an agent (more properly designated, for instance, as a "care of" party).[12]

To hold, as Novolog asks us to do, that the designation in the relevant bills of lading should not be given effect without some further evidence of consent or involvement would also frustrate the plain intent of Section 10743, which is to facilitate the effective assessment of charges by establishing clear rules for liability.

Railway demurrage charges have "from the start been inseparably coupled with the car supply question." Harleigh H. Hartman, *Law and Theory of Railway Demurrage Charges* 9 (1928). Their most

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[12] The alleged bills of lading in this case designate Novolog as the sole consignee, without any indication that it is an agent. If the bills of lading already contain a designation such as "care of," however, the agency relationship is considered disclosed and the consignee-agent is not subject to liability for demurrage charges. *See R. Franklin Unger, Trustee of the Ind. Hi-Rail Corp., debtor-Petition for Declaratory Order-Assessment and Collection of Demurrage of Switching Charges*, STB Docket No. 42030, 2000 STB Lexis 333, n. 13 ("demurrage and detention charges . . . do not apply to agents acting for the principal parties to the transportation [if] the agency relationship [is] disclosed"; if the "waybills contain . . . language that would clearly establish or refer to an agency relationship," the agency relationship is considered disclosed.)

important purpose is to encourage the prompt return of freight cars to service so as to guarantee the steady flow of rail freight. *See Pennsylvania R.R. Co. v. Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323, 40 S.Ct. 532, 64 L.Ed. 928 (1920) (purpose of demurrage charges is "to promote [railcar] efficiency by penalizing undue detention of cars.") Congress's concern with ensuring that railcars be available for transportation and not sidelined or improperly used as storage facilities is reflected in 49 U.S.C. § 10746, which provides that rail carriers "shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to – (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property." Compensation of the railroads for the use of their equipment is a secondary purpose of demurrage charges. *Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 271 U.S. 259, 262, 46 S.Ct. 530, 70 L.Ed. 934 (1926); 4 Saul Sorkin, *Goods in Transit* § 25.02[1] & n. 2 (updated 2007) (collecting cases).

For demurrage charges to fulfill their purpose of ensuring the smooth functioning of the rail freight system by creating disincentives against delays, railways must be able to assess them effectively and without being mired in disputes. Section 10743 is designed to ensure just that. The simple rule that the named consignee becomes liable for demurrage charges upon acceptance of the freight unless it timely notifies the carrier of an agency relationship

allows railroads to rely on the bills of lading and avoid wasteful attempts to recover from the wrong parties. For their part, recipients of freight who should not be saddled with liability for transportation charges arising after delivery can escape it with little effort by simply providing written notice of their status to the carrier.

Finally, although Novolog suggests that it would be inequitable to allow a carrier's or shipper's unilateral choice of designation to make it party to the transportation contract, no unfairness results from applying the statute's plain language. Under the statutory scheme, the named consignee can avoid liability in two ways: first, by refusing the freight (which Novolog concedes it could have done); and second, by providing the carrier timely written notice of agency under Section 10743(a)(1), if appropriate. The rail carrier, in contrast, has no option but to deliver the freight to the consignee named by the shipper, whether that be the ultimate consignee or owner or a middleman such as a transloader or warehouseman. As *amici* railroads argue, such middlemen generally have no incentive to enter into separate contracts with carriers that would make them responsible for demurrage charges; if they cannot easily be held accountable for their own delays, they may simply decide to use the rail cars as free storage. Holding such entities presumptively responsible for delays occurring while the railcars are under their control under the clear rule of Section 10743 ensures that the railroads will be able to assess

demurrage, while also making it possible for all parties (carriers, middlemen such as Novolog, shippers, and ultimate consignees) to allocate the risk of liability by private contract, if they so choose.

For these reasons we decline to follow the Court of Appeals for the Seventh Circuit's recent conclusion in a similar case that the entity listed as the consignee on the relevant bills of lading was not, without more, the legal consignee under Section 10743. *See South Tec*, 337 F.3d at 821. *See also Union Pacific Railroad Co. v. Carry Transit*, No.3:04-CV-1095-B (N.D.Tex. Oct. 27, 2005) (following *South Tec*). In *South Tec*, a printing company (Donnelley) had an agreement with a carrier (the Illinois Central Railroad) to transport paper from Donnelley's paper suppliers to the South Tec warehouse. There the paper was sorted and stored and the railcars released. When Donnelley needed the paper, it was loaded on other railcars or trucks and brought to the Donnelley facility. According to Donnelley's agreement with Illinois Central, the bills of lading should state simply that the car was "to stop at South Tec Warehouse. . . . Freight Charges Cover Shipments to Ultimate Destination." *Id.* at 814-15. Although at least ninety percent of the bills of lading named Donnelley as the consignee, however, there was a wide variation among the bills of lading, and a small percentage named South Tec as the consignee. *Id.* at 815, 821.

The District Court held that South Tec was liable for the demurrage charges because it had failed to

comply with the notification requirements of 49 U.S.C. § 10743(a)(1). The Court of Appeals disagreed, noting that the District Court had apparently assumed that South Tec was indeed the consignee of the freight for purposes of the statute, and remanded for a determination of "who was the legal consignee (or consignees) of the paper shipments in question." *Id.* at 822.

In remanding, the Court of Appeals did not strictly rule out the possibility that South Tec might in fact qualify as a consignee under the statutory provision, but it intimated that, without more, the facts then in the record made it unlikely. It held that "being listed by third parties as a consignee on some bills of lading is not alone enough to [become] a legal consignee liable for demurrage charges, although it, coupled with other factors, might be enough to render South Tec a consignee." *South Tec*, 337 F.3d at 821. Although the court did not explain what additional factors might be considered, it suggested that one of the factors militating *against* finding South Tec to be a consignee under the statute was that the railroad had notice of South Tec's agent status because of the large number of bills of lading designating it as a "care of" party. *Id.*[13]

[13] It is unclear from the opinion whether the railroad sought to assess demurrage charges on all the shipments or only on those in which South Tec was named as the sole consignee.

In our view the *South Tec* court's approach frustrates the statute's intent in two ways. First, in contrast to the statute's clear rule, *South Tec* envisages a "designation-plus" analysis under which the entity named as the consignee on the bill of lading would be presumptively liable for demurrage only if "other factors" were present. Under such a regime, railroads would be forced to second-guess their bills of lading and perform indeterminate weighing tests before deciding who is to be charged. And second, *South Tec* suggests that consignees must satisfy the notification requirements of Section 10743 only when the carrier does not already have notice – through other bills of lading or otherwise – that the named consignee is acting as the agent of another. Practically, this would require consignees and railroads alike to ask with respect to each shipment whether, in the universe of shipments involving the same actors, a sufficient number of bills of lading have clarified the agency relationships so as to exempt the consignee from the statutory requirements. A far more effective system is to treat each bill of lading as a separate instance, so that in each case the entity named as consignee is presumptively responsible for demurrage.

In addition to relying on *South Tec*, Novolog seeks to support its position that it cannot be considered a consignee under the statute (or otherwise) by citing to decisions outside the narrow context of the interpretation of Section 10743(a)(1), which it claims represent "longstanding law barring imposition of

demurrage liability upon an entity unilaterally designated as a consignee." This characterization is incorrect. What the cases unanimously require for consignee liability is that the transloader or other transportation intermediary that does not have a beneficial interest in the freight *at least* be named as the consignee in the bill of lading. *See Middle Atl. Conference*, 353 F.Supp. 1109, 1119 n. 31 (finding general agreement in the case law that where middlemen such as warehousemen or pier operators (1) acted as known agents or (2) were not named as consignors or consignees, they were not parties to the transportation contract and were not liable for demurrage charges); *CSX Trans., Inc. v. City of Pensacola*, 936 F.Supp. 880, 885 (N.D.Fla.1995) (relying on the fact that the Port of Pensacola was not listed as a consignee on any of the bills of lading to find it was not liable for demurrage under the railroad's tariff).

On the question whether such a designation is *sufficient* to make the transloader a consignee potentially liable for charges, however, the existing precedent is considerably less clear.

Our decision in *Union Pacific R.R. Co. v. Ametek, Inc.*, 104 F.3d 558 (3d Cir.1997) (*Ametek*), for instance, has nothing to say about whether a transloader that is named as the consignee might be liable for demurrage charges. That case reached this Court on appeal from the District Court's review of the ICC's decision in *Ametek, Inc. – Petition for Declaratory Order; Ametek, Inc. v. Panther Valley R.R. Corp.*, ICC Docket No. 40663, 1993 ICC Lexis 13 (Jan. 15,

1993) (*ICC Ametek*), where the ICC had held unlawful the attempt by creditors of a certain rail freight carrier to collect demurrage charges from the owner and operator of a plastic processing facility. Ametek "receive[d] raw plastic materials for processing [and after] processing the materials . . . ship[ped] the processed product to the material suppliers' customers." *ICC Ametek* at *4. In the vast majority of the cases, Ametek was not named as the consignee or the consignor on the bills of lading. The ICC, however, also noted that, with respect to a few of the shipments, "Ametek *was a party to the transportation contract by being named as the consignee*. . . ." *Id.* at *17 (emphasis added). Where Ametek was listed as the consignee on the bill of lading, it was potentially liable for the charges. By the time the case reached us, however, the issue of whether it might be liable in the very small number of instances in which Ametek was named as a consignee was no longer being litigated; our review was focused on whether Ametek was liable – either through its receipt of the freight or by some separate contractual arrangement – where it was *not* named as the consignee in the bill of lading. *See id.* at 560 (Ametek "generally was not the consignor or consignee designated on the bills of lading"), at 563 (it was "undisputed that Ametek was not a party to the transportation contracts"). We did not even mention, much less take a position on, the ICC's apparent assumption that Ametek *was* a party to the transportation contract in the few cases in which it was named as a consignee. Thus *Ametek* is of no help

to Novolog – and indeed, the ICC's position in that litigation supports our view.

Middle Atlantic Conference is of no more comfort to Novolog. The court there held that a certain tariff unilaterally expanding the definition of "consignee" to include any person to whom the bill of lading instructed the carrier to deliver the shipment, but specifically explained that the tariff was invalid because it attempted to impose liability on a party who was not a party to the transportation contract, "*i.e.*, a person *not named in the bills of lading as consignor or consignee.*" *Middle Atl. Conference*, 353 F.Supp. at 1112 (emphasis added). Thus *Middle Atlantic Conference* does not stand for the proposition that a tariff may not make such entities as warehousemen liable for demurrage charges, but that it may not do so without support from the bill of lading and simply because of the "mere fact of handling the goods shipped." *Id.* at 1118.

The "longstanding law" invoked by Novolog for the proposition that a transloader cannot be considered a consignee for demurrage purposes where it has not executed the bill of lading that names it as the consignee is, in fact, limited to three federal district court cases. *See CSX Transp., Inc. v. Port Erie Plastics, Inc.*, No. 05-139 Erie, 2006 WL 2847414 (W.D.Pa. Sep.29, 2006) (following the District Court's decision in this case); *Union Pacific Railroad Co. v. Carry Transit*, No. 3:04-CV-1095-B (N.D.Tex. Oct. 27, 2005) (holding that where a transloader did not have any beneficial interest in the freight and did not authorize

the shippers to list it as a consignee it could not be held liable for demurrage charges); and *Southern Pacific Transp. Co. v. Matson Navigation Co.*, 383 F.Supp. 154, 157 (N.D.Cal.1974) (holding that a transloader who is "merely named in the railroad bill of lading" without being actively involved in the transportation contract and without any "culpability for the delay" cannot be liable for demurrage, but noting specifically that the transloader had been named as the "care of" party in the vast majority of the bills of lading under examination). We do not find these cases persuasive.[14]

For these reasons we hold that an entity named on a bill of lading as the sole consignee, without any

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[14] Novolog also urges us to consider *Evans Prods. Co. v. Interstate Commerce Comm'n*, 729 F.2d 1107, 1113 (7th Cir.1984). *Evans* involved an attempt to assess demurrage charges against repair facilities; the court there concluded, among other things, that "[a]lthough they receive cars and ship the repaired cars out again, repair facilities are not consignors or consignees of the cars because delivery of the cars as freight is not completed and the carrier's lien is not extinguished when the repair facility receives the car. Repair facilities do not determine the further disposition of the cars, but rather act at the behest of the car owners/lessors." *Id.* at 1113. It is unclear under what travel documents the empty rail cars traveled on their way to the repair facilities; the court appears to have based its decision on the common-sense notion that a rail car is not going to a repair facility to stay there, but rather will be released to its owner or lessee after some time. We do not find the analogy between a transloader and a repair facility – which presumably does not engage in loading or unloading operations and cannot be the consignee of freight – particularly instructive.

designations clearly indicating any other role, is presumptively liable for demurrage fees on the shipment to which that bill of lading refers, but may avoid liability, if it is an agent, by following the notification provisions of 49 U.S.C. § 10743(a)(1). On remand, the District Court should determine whether Novolog appeared as the consignee on the relevant bills of lading. Because it is undisputed that Novolog did not comply with the statutory notification provision, it will be unnecessary to determine whether it acted as an agent in the instances where it was named as the consignee.

C. Liability for demurrage charges of a named shipper or consignor

The final issue in this case is whether CSX may assess demurrage charges against Novolog as the consignor for the instances in which Novolog ordered empty railcars, which it then loaded with freight for CSX to transport to a domestic destination. CSX seeks to assess demurrage under Item 8070(G) of its tariff, which provides that "[u]nless otherwise advised, in WRITING, that another party is willing to accept responsibility for demurrage, consignor at origin or consignee at destination will be responsible for the payment of demurrage charges" (emphasis in original). CSX's tariff defines "consignor" as "[t]he party in whose name a car[s] is ordered; or the party who furnishes forwarding direction."

During the summary judgment proceedings, CSX introduced disputed evidence that Novolog appeared as the consignor on a number of bills of lading for such shipments. The District Court, however, made no findings of fact related to Novolog's consignor status and did not discuss this issue separately in its opinion. Nor did the parties fully brief this issue on appeal.

Although consignor liability is not regulated by 49 U.S.C. § 10743 or an analogous statutory provision, we see no reason why the principles applicable to consignee liability under the statute should not be made equally applicable to consignor liability. If the analogous rule governed, the entity named as consignor or shipper on the bill of lading would be liable unless it had ordered the empty railcars as an agent of another and had so notified the carrier in writing at the time of the request or unless, if another entity had designated it as consignor, it notified the carrier prior to shipment. Nonetheless, we find the record insufficient and the briefing too cursory to announce a rule. We will instead vacate the District Court's grant of summary judgment with respect to the claims based on consignor liability and instruct it to reexamine this issue in light of our discussion of consignee liability. On remand, the District Court should determine whether Novolog appeared as the shipper/consignor on the relevant bills of lading. The District Court may also find it necessary to determine whether Novolog was an agent in the instances in which it appeared as shipper or consignor in the bills

of lading and, if so, whether it appropriately notified CSX of the relationship.

III. *Conclusion*

For the reasons stated above, we will **vacate** the District Court's order granting judgment as a matter of law in favor of Novolog and we will **remand** this case to the District Court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3431

CSX TRANSPORTATION COMPANY,
Appellant

v.

NOVOLOG BUCKS COUNTY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. No. 04-cv-04018)
District Judge: Hon. Thomas N. O'Neill, Jr.

Argued on July 12, 2007

Before: SLOVITER, ALDISERT and ROTH, *Circuit Judges*

JUDGMENT

This case came on to be heard on the record before the United States District Court for the Eastern District of Pennsylvania and was argued on July 12, 2007.

Upon consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated July 12, 2006, is **vacated** and we will **remand** this case to the District Court for further proceedings consistent with this opinion. **Costs taxed against the Appellee.**

All of the above in accordance with the Opinion of this Court.

ATTEST:

Marcia M. Waldron
Clerk

Dated: September 5, 2007

Costs taxed in favor of the Appellant as follows:

Briefs $1038.29

Total..... **$1038.29** [/s/ PSD]

Certified as a true copy and issued in lieu of a formal mandate on 10/09/07

Teste: /s/ [Illegible]

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

2006 WL 1451280

United States District Court, E.D. Pennsylvania.
CSX TRANSPORTATION CO.
v.
NOVOLOG BUCKS COUNTY.
Civil Action No. 04-4018.

May 24, 2006.

Kenneth J. Grunfeld, Janssen & Keenan, PC, Philadelphia, PA, for CSX Transportation Co.

Anthony J. Dimarino, III, A.J. Dimarino, III P.C., Frederick A. Tecce, McShea Tecce PC, Philadelphia, PA, for Novolog Bucks County.

MEMORANDUM

O'NEILL, J.

Plaintiff, CSX Transportation Co., a Virginia railroad shipping company with its principal place of business in Florida, filed a complaint on August 24, 2004 (and amended complaint on November 18, 2004) alleging that defendant, Novolog Bucks County, a Pennsylvania corporation with its principal place of business in Pennsylvania that operates a private railroad port at the U.S. Steel Fairless Works on the Delaware River, for demurrage charges assessed pursuant to 49 U.S.C. § 10746, the related rules promulgated by the U.S. Surface Transportation Board, and CSX Tariff 8100 for Novolog's failure to release CSX's railcars in a timely manner. CSX seeks $260,304 in demurrage charges, with interest, and

attorneys fees. Novolog filed its answer and counterclaim on November 21, 2004 (and amended answer and counterclaim on December 15, 2004) alleging that CSX breached a Refund Contract under which CSX promised to pay Novolog a switching fee for the movement of its railcars at Novolog's facility, to which CSX filed its answer on January 11, 2005. Novolog seeks $52,899 in switching fees, with interest, and attorneys fees. Before me now are the parties' cross motions for summary judgment, responses, replies, and surreplies thereto as well as the transcript of the parties' April 27, 2006 oral argument in this case.

BACKGROUND[1]

I. *The Parties*

A. Novolog

Novolog operates a private railroad port on the Delaware River as a tenant at the U.S. Steel Fairless Works facility in Fairless, Pennsylvania. Novolog serves both as a port of origin and destination for cargo. Novolog is hired by exporters and, in exceptional circumstances by manufacturers, to load or unload the exporters' cargo to and from rail cars. Novolog is recognized as an "open gate" facility,

[1] The parties have failed to provide a clear or comprehensive statement of the facts. Nevertheless, I have found within the melee sufficient facts from which I may determine whether there are a genuine issues of fact that preclude summary judgment. I find that there are.

meaning that within its 700 car facility it receives and holds rail cars on its tracks at the convenience of railroad carriers.

B. CSX

CSX is a railroad carrier that moves freight from origin to destination pursuant to instructions received electronically from various shippers. According to John Underwood, CSX's Manager of Supplemental Revenue, CSX is obligated, as a common carrier, to take the product as delivered and ship it to the requested destination. CSX cannot refuse to transport freight irrespective of excessive volume of rail cars to a single destination. CSX does not have any process that allows it to monitor or limit its ability to move the freight to an ultimate destination. The only process available for CSX to monitor this flow is by a "local person." There is nothing that restricts CSX from taking receipt of the rail cars when they are loaded and moving them to the ultimate destination.

Although the Fairless facility is operated by Novolog, rail services within in and around the port frequently are provided by Conrail Shared Assets, an entity related to CSX; that is, all rail cars are delivered and picked up by Conrail, with the exception of "unit trains" which are delivered and picked up directly by CSX and the Norfolk Southern Railway Co. The Conrail crew routinely moves rail cars between Novolog's port and Conrail's local rail servicing yard at Morrisville, Pennsylvania.

II. *The Contracts*

A. Transportation Contracts

In early 2003, CSX entered into numerous freight agreements with various steel companies for the shipment to and eventual export of steel cargo from Novolog's port. The timing and logistics of these agreements were negotiated by CSX and the steel companies. Novolog was not a party to these negotiations or the resulting agreements. Novolog did not execute any contract designating Novolog as the shipper, consignor, or consignee for the shipment of the steel cargo. The steel cargo was not ordered in Novolog's name and Novolog did not furnish forwarding directions for that cargo. Novolog did not enter into any express contract with CSX to assume liability for demurrage charges pursuant to CSX's tariff.

Notwithstanding Novolog's lack of participation in these agreements, Novolog was engaged in unloading full railcars for export and loading empty cars for import. With respect to inbound railcars (Novolog's export business), Novolog received full railcars, unloaded them according to shipping instructions from various domestic steel companies, which identified Novolog as the "ship to" party or the consignee, and eventually released the railcars back to CSX. CSX asserts – without evidentiary support – that Novolog had contracts with these steel companies for the handling of the steel freight. CSX further asserts – without evidentiary support – that Novolog knew that the steel was inbound before it arrived and had

specific instructions from shippers on how to handle the steel freight.

With respect to outbound railcars (Novolog's import business), Novolog received empty rail cars from Conrail, loaded those cars at its facility, and released them to Conrail with a bill of lading detailing shipping instructions and the final destination. In this context, CSX asserts that Novolog frequently was the actual party that ordered the empty railcars from Conrail. CSX also asserts that for all the traffic that originated at Novolog's facility Novolog is named as the shipper on the waybills.

B. *Refund Contract*

Novolog alleges that CSX and Novolog entered into a Refund Contract under which CSX agreed to pay Novolog twenty one dollars per loaded car for the movement of the CSX railcars at the port and for Novolog's switching services. The Refund Contract is signed by David Reid, President and CEO of Novolog, on behalf of Novolog, but is not signed by anyone at CSX. Nevertheless, Novolog performed the movement and switching services and sent CSX three invoices pursuant to the terms of the agreement. CSX refuses to make payment for these services because it asserts that it never entered into any agreement for them.

III. *Congestion at Novolog's Port*

During the early part of 2003, numerous steel manufacturers found it commercially advantageous to export steel in high volume. According to David Reid, numerous "customers" contacted Novolog about the prospect of exporting their steel via Novolog's port. Because Novolog did not have significant activity at its port at that time, Novolog allowed these customers to ship and/or receive the steel freight at Novolog's port. Upon arrival, Novolog unloaded these railcars according to instructions received from the respective exporters of the steel goods. An exceptionally large volume of railcars arrived at Novolog's facility in March 2003. This led to significant track congestion at and between Novolog's port and Conrail's Morrisville facility. Consequently, railcars destined for Novolog could not arrive because both facilities were full. As a further consequence, Novolog held the railcars beyond the two day free time period provided for by CSX. In turn, CSX sent Novolog invoices for demurrage charges and placed an embargo with the Association of American Railroads. At that time, individuals from Novolog, CSX, Norfolk Southern Railroad, and Conrail met to discuss the excessive congestion at Novolog. No solution to this problem was presented to Novolog, but the parties agreed that it was Novolog's problem to fix.

IV. *Demurrage Invoices*

Between December 2002 and August 2003, CSX sent Novolog twelve demurrage invoices: seven for inbound demurrage and five for outbound demurrage. CSX asserts that each of the railcars which incurred demurrage is identified on each invoice, and each rail car has a corresponding bill of lading or waybill which identifies the shipper, the origin, the consignee, and the destination of the rail car.

With respect to the inbound demurrage invoices, CSX asserts that Novolog was the consignee of record on all inbound freight because: (1) Novolog is named as the consignee on the waybill for each loaded railcar delivered to Novolog's facility; and (2) the data fed by CSX into the "car and train reporting" computer system instructed the Conrail crew at Morrisville to deliver the cars to Novolog. With respect to outbound demurrage invoices, CSX asserts that Novolog was the consignor of all outbound freight because: (a) Novolog is listed as the shipper and Fairless, PA is listed as the origin on the waybill; and (b) Novolog ordered the empty rail car for its own transportation purposes.

Novolog never filed a formal dispute with CSX to object to the demurrage charges. However, Novolog has refused to pay the demurrage charges because it was not a party to the transportation contract and did not have responsibility for or control over the volume of railcars that entered its facility.

V. *The Evidence*

In support of its motion, CSX proffers the following evidence: (1) the July 13, 2004 email from Kay Fearrington, Senior Manager of Credit & Collections at CSX, to Sandra Kelley, Easter Ball, and Michael Bogdan at Novolog informing them of the demurrage charges (CSX-0001); (2) the July 13, 2004 table listing twelve amounts due from Novolog for monthly demurrage charges (CSX-0002); (3) eleven "original incidental bills" created by CSX listing Novolog as the shipper with the port of origin as Fairless, PA and billed to Novolog for monthly demurrage charges plus interest pursuant to CSX Tariff 8100 (CSX-0003-CSX-0033); (4) a copy of CSX Tariff 8100, Section VIII-C Demurrage Provisions (CSX-0034-CSX-0068); (5) the September 23, 2005 deposition of Armand Pellicione; (6) the November 9, 2004 table listing twelve amounts due from Novolog for monthly demurrage charges (CSX-0069); (7) twelve "original incidental bills" with supporting documentation[2] from the local rail yard listing Novolog as the shipper and the port of origin as Fairless, PA, and billed to Novolog for monthly demurrage charges plus interest pursuant to

[2] Confusingly, the only legible and comprehensible portions of the supporting documentation appear to be created by Novolog. These documents show the port of origin to be "Fairless, PA (Shared Assets)," the shipper to be various steel companies, the consignee to be various other steel companies at various destinations, and the route to be via CSX.

CSX Tariff 8100 (CSX-0070-CSX-0136);[3] (8) seven printouts from CSX's accounts receivable listing Novolog as the consignee, AK Steel Corp. as the shipper, Middletown, OH as the origin, and Fairless, PA as the destination (CSX-0137-CSX-0143);[4] (9) seventeen pages of an excel spreadsheet created by CSX listing Novolog as the consignee and Fairless, PA as the destination (CSX-0144-CSX-0160);[5] (10) 198 pages of outbound (import) waybills listing the port of origin as Fairless, PA, the port of destination Jacksonville, FL, CSX as the route, various steel companies as consignees, and Novolog as the shipper (CSX-0169-CSX-366).

CSX also proffers the following evidence: (11) 563 pages of inbound (export) waybills listing the port of origin as various locations, the port of destination as Fairless, PA, CSX as the route, Novolog as the consignee, and various steel companies as the shipper (CSX-0367-CSX-0929); (12) two cancelled embargo notices created by John Carroll, Senior Assistant Vice President for Business Services at the Association of American Railroads listing CSX as the railroad, Novolog as the party which CSX's freight was

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[3] Novolog argues that these documents contain inadmissible hearsay. *See Pamintuan v. Nanticoke Mem'l Hosp.*, 192 F.3d 378, 387 n. 13 (3d Cir.1999) (holding that a reviewing court may only consider evidence that would be admissible at trial).

[4] Novolog argues that these documents are not actual samples of bills of lading. *See id.*

[5] Novolog argues that these spreadsheets are unauthenticated. *See id.*

"Consigned, Reconsigned To, of Intended For," and complaining of accumulation (CSX-0930-CSX-0931); (13) 169 transaction car event inquiry pages listing Novolog as the consignee (CSX-1003-CSX-1171); (14) the September 7, 2005 deposition of Reid; (15) the December 9, 2005 deposition testimony of Underwood; (16) his January 5, 2006 declaration;[6] and (17) his February 6, 2006 second affidavit.

In support of its position, Novolog proffers the following evidence: (a) the Refund Contract drafted by CSX with an effective date of December 16, 2002 and end date of December 31, 2003 signed by Reid but not signed by anyone from CSX (NOV-0001-NOV-0003); (b) three quarterly invoices created by Novolog and "sold to" CSX pursuant to the Refund Contract for switching fees (NOV-0004-NOV-0006); (c) the September 12, 2003 email from Reid to someone named Marion at CSX stating that Novolog was not the shipper or consignee or freight forwarder of the steel goods in CSX's railcars and explaining Novolog's view of the demurrage charges (NOV-0007-NOV-0008); (d) the October 27, 2003 letter from Kiran Burgess, Assistant Director of Supplemental Revenue at CSX,

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[6] Novolog argues that Underwood's Declaration is inadmissible for summary judgment purposes because: (1) it is not made upon his personal knowledge; (2) contains conclusory statements; (3) contains inadmissible hearsay; and (4) fails to attach the referenced documents. *See id.* I need not address these evidentiary arguments at this time because I find there to be a genuine issue of fact as to whether CSX demurrage charges arose out of a contractual relationship.

to Reid informing him of CSX's final demand for payment of demurrage (NOV-0009); (e) the April 10, 2003 letter from Reid to J.M. Woodall protesting CSX's demurrage charges and discussing the cooperative plan created by joint efforts of Novolog and local CSX personnel to release CSX's railcars as soon as possible (NOV-0010-NOV-0012); (e) the April 10, 2003 CSX Coil Car Report (NOV-0013); (f) the April 9, 2003 letter from J.M. ("Mike") Woodall, Vice President of Metals at CSX, to Reid advising him of CSX imposing demurrage charges and a possible embargo against Novolog (NOV-0015); (g) a copy of CSX Tariff 8100, Section VIII-C Demurrage Provisions (NOV-0016-NOV-0029); (h) one bill of lading dated March 25, 2003 sent from Bob Francis at Steel Dynamics, Inc. to Trevor Ryals at Triorient Trading Inc. listing Novolog as the "ship to" party, Triorient as the "sold to" party, Steel Dynamics as the shipper, and CSX as the carrier (NOV-0158); and (i) the undated declaration of Reid.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c) (2004). The moving party "bears the initial responsibility of informing the district court of

the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e) (2004).

I must determine whether any genuine issue of material fact exists. An issue is genuine if the fact finder could reasonably return a verdict in favor of the non-moving party with respect to that issue. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). An issue is material only if the dispute over the facts "might affect the outcome of the suit under the governing law." *Id.* In making this determination, I must view the facts in the light most favorable to the non-moving party, and the non-moving party is entitled to all reasonable inferences drawn from those facts. *Id.* However, the nonmoving party may not rest upon the mere allegations or denials of the party's pleading. *See Celotex,* 477 U.S. at 324. The non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, mere suspicions. *Williams v. Borough of W. Chester,* 891 F.2d 458, 460 (3d Cir.1989). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be

granted. *Anderson,* 477 U.S. at 249-50 (citations omitted).

Cross motions are claims by each party that it alone is entitled to summary judgment; they do not constitute an agreement that if one is denied the other is necessarily granted or that the losing party waives judicial consideration and determination of whether genuine issues of material fact exist. *Rains v. Cascade Indus., Inc.,* 402 F.2d 241, 245 (3d Cir.1968). If any such issue exists it must be disposed of at trial and not on summary judgment. *Id.* For the reasons that follow, I find that genuine issues of material fact exist and will deny both parties' motions.

DISCUSSION[7]

I. *Liability for Demurrage*

Demurrage, in the context of railroads, is defined as "a charge exacted by a carrier from a shipper or consignee on account of a failure on the latter's part to load or unload cars within the specified time prescribed by the applicable tariffs; the purpose of the charge is to expedite the loading and the unloading of cars, thus facilitating the flow of commerce, which is in the public interest. Demurrage is extended freight

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[7] Novolog argues in its response brief that CSX appears to assert a new theory of liability in its motion for summary judgment in violation of Federal Rule of Civil Procedure 37(c)(1). *See Nicholas v. Pa. State Univ.*, 227 F.3d 133, 148 (3d Cir.2000). I disagree and will focus on the parties' substantive arguments.

and is the amount payable for delays by receiver in loading or unloading cargo; it is stipulated damages for detention." Black's Law Dictionary 432 (6th ed.1990) *citing St. Louis, Southwestern Ry. Co. v. Mays,* 177 F.Supp. 182, 183 (D.Ark.1959) and *Hellenic Lines Ltd. v. Director Gen. of India Supply Mission,* 319 F.Supp. 821, 831 (S.D.N.Y.1970); *see also Ill. Cent. R.R. Co. v. South Tec Dev. Warehouse,* 337 F.3d 813, 815 (7th Cir.2003) (quoting same); *Union Pac. R.R. Co. v. Ametek, Inc.,* 104 F.3d 558, 559 (3d Cir.1997) ("Railroads charge shippers and receivers of freight 'demurrage' fees if the shippers or receivers detain freight cars on the rails beyond a designated number of days."); *CSX Transp., Inc. v. City of Pensacola, Fla.,* 936 F.Supp. 880, 883 (N.D.Fla.1995) ("[D]emurrage is the fee a railroad charges for the undue detention of the carrier's railcars. It is intended to both compensate for the delay, and to promote efficiency by deterring undue delays."); *Middle Atl. Conference v. United States,* 353 F.Supp. 1109, 1113-15 (D.D.C.1972) (discussing history of demurrage).[8]

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[8] The Court of Appeals for the Sixth Circuit similarly has defined demurrage to mean:

> an expense shippers incur for retaining railcars beyond the "free time" period. Demurrage charges are an integral part of the established rules and regulations relating to the use and movement of railcars. The charges are neither rates nor penalties, rather, they have a unique status as car service rules. Demurrage charges serve two purposes. First, they compensate

(Continued on following page)

Congress provides for such demurrage charges by common carriers by statute:

> A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to – (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property.

49 U.S.C. § 10746. Therefore, "[a]s a regulated common carrier, CSX is required to file a tariff schedule with the I.C.C. in which all of its freight rates and miscellaneous charges, included demurrage, are specified." *Pensacola,* 936 F.Supp. at 883 *citing* 49 U.S.C. § 10762(a). Moreover, "the carrier is under a duty to collect and the shipper or consignee is under a duty to pay the same. They have no choice in the matter, and it is not a legitimate subject for compromise or settlement between them." *Mays,* 177 F.Supp. at 184. "A carrier may not collect at a different rate

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> railroads for the lost opportunity to profit from the use of their cars. *Iversen v. United States,* 63 F.Supp. 1001, 1005 (D.D.C.1946). Second, they promote the overall efficiency of the rail system by creating an incentive to return the cars promptly. *Id.* Free time is that period of time which, under normal circumstances, affords the shipper a sufficient opportunity to unload a car and release it to the railroad.

Cleveland Elec. Illuminating Co. v. Interstate Commerce Comm'n, 685 F.2d 170, 171 (6th Cir.1982).

for a service included in its filed tariff, even with the consent of the other party." *Pensacola,* 936 F.Supp. at 883 *citing* 49 U.S.C. § 10762(a). CSX and other rail carriers also have published detention periods for its consignors[9] and consignees.[10] CSX set the free time at two days, meaning that its demurrage charges begin to accrue when a rail car has been detained beyond that period. The demurrage charges and detention periods are stated in CSX Tariff 8100 which is published by CSX on its web site and are specifically incorporated into all transportation agreements.

CSX asserts that a shipper or consignee that accepts the actual or constructive placement of a rail car for loading or unloading at its facility necessarily

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[9] Consignor means: "One who sends or makes a consignment; a shipper of goods. The person named in a bill of lading as the person from whom the goods have been received for shipment." Black's Law Dictionary 307 (6th ed.1990) (internal citations omitted). For purposes of this discussion, shipper is synonymous with consignor.

[10] Consignee means: "One to whom a consignment is made. Person named in bill of lading to whom or to whose order the bill promises delivery. In a commercial use, 'consignee' means one to whom a consignment may be made, a person to whom goods are shipped for sale, or one to whom a carrier may lawfully make delivery in accordance with his contract of carriage, or one to whom goods are consigned, shipped, or otherwise transmitted." Black's Law Dictionary 307 (6th ed.1990) (internal citations omitted). Consignee is defined in CSX's Tariff to mean, "The party to whom a shipment is consigned, or the party entitled to receive the shipment." Typically, as here, consignees play no role in the negotiation of rates, the payment of freight rates, the routing of freight, or the preparation of the bill of lading.

agrees to accept liability for demurrage charges pursuant to the published tariff, irrespective of fault, even where the defendant alleges that it is only an agent. CSX argues that Novolog is liable for its demurrage charges because: (1) Novolog was named as consignee on each electronic bill of lading[11] and waybill;[12] (2) CSX delivered its railcars to Novolog pursuant to those bills of lading and waybills; and (3) congestion at Novolog's port facility caused the railcars to be held either at the Conrail receiving yard in Morrisville or at Novolog's port facility beyond the free time set forth in CSX's tariff. I disagree.

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[11] The bill of lading is the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers." *S. Pac. Trans. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982). Black's Law Dictionary similarly defines bill of lading to mean, "Document evidencing receipt of goods for shipment issued by person engaged in business of transporting or forwarding goods and it includes airbill. An instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place. It is receipt for evidence of title to goods." Black's Law Dictionary 168 (6th ed.1990).

[12] Waybill means: "Written document made out by carrier listing point of origin and destination, consignor and consignee, and describing goods included in shipment and transportation costs. Such constitutes the written description of the shipment in the event of any claim by or against common carrier." Black's Law Dictionary 1593 (6th ed.1990).

A. Fault

A finding of fault plays a limited role in determining demurrage liability. The Court of Appeals for the Fourth Circuit has explained:

> Demurrage charges are part and parcel of the transportation charges, and are covered by the same rules of law. They are a part of the tariff, and must be collected from the shipper or the consignee of the freight to the same extent as the charge for carriage. A penalty is imposed on the carrier for failure to collect; the purpose of the law being, of course, to secure absolute equality between shippers.

Davis v. Timmonsville Oil Co., 285 F.470, 472 (4th Cir.1922) (internal citations omitted); *see also City of New Orleans v. S. Scrap Material Co, Ltd.*, 491 F.Supp. 46, 48 (E.D.La.1980); *Colo. & S. Ry. Co. v. S. Roofing & Sheet Metal Co.*, 374 F.Supp. 24, 25 (W.D.Okla.1974). Therefore, demurrage may be assessed against a shipper/consignor "where the detention occurs through no fault of the shipper, even though the cause of detention is beyond the shipper's control." *Union Pac.*, 490 F.2d at 1390 quoting *Chrysler Corp. v. New York Cent. R.R.*, 234 I.C.C. 755, 758 (1939). Demurrage also may be assessed against a receiver/consignee "even though the detention occurs through no fault of the consignee, for a cause that is beyond the consignee's control." *New Orleans*, 491 F.Supp. at 48. However, demurrage may not be assessed against the shipper or consignee in the limited

circumstance "where the delay is the fault of the carrier," *Union Pac.*, 490 F.2d at 1390 quoting *Pa. R.R. v. Moore-McCormack Lines, Inc.*, 370 F.2d 430 (2d Cir.1966) (internal quotations omitted), because "a carrier may not be permitted to recover demurrage incurred from its own failure to act in a reasonable manner." *Ill. Cent. Gulf R.R. Co. v. S. Rock, Inc.*, 644 F.2d 1138, 1141 (5th Cir.1981).[13]

Here, there is no evidence to suggest that the congestion at Novolog's port was caused by any fault on the part of CSX. CSX thus argues that Novolog is responsible to pay demurrage charges because: (1) it is the named consignee on the bills of lading and waybills; (2) it accepted and received the railcars from CSX; and (3) retained constructive or actual physical custody of the railcars beyond the free time. However, CSX has not asserted any contractual relationship with Novolog from which demurrage liability may arise.

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[13] CSX also argues-without legal authority-that as a common carrier, it is required to provide rail service at a reasonable rate to any shipper that requests its transportation services regardless of the capacity of the destination; it cannot deny its services to any shipper at any time for any reason. CSX therefore asserts that it does not have any duty to monitor the ingress or egress of railcars at Novolog's port facility or prevent shippers from requesting transportation of their freight to Novolog's port irrespective of any congestion there.

B. *Contractual Relationship*

A comprehensive review of the relevant case law demonstrates that liability for demurrage must arise out of a contractual relationship. *See S. Pac. Trans. Co. v. Matson Navigation Co.*, 383 F.Supp. 154, 156 (N.D.Cal.1974) ("The promise to pay demurrage need not be an express one, but may be implied in order to compensate the carrier for the use of its equipment. But, while the obligation to pay may be implied, the promise nonetheless arises out of the contractual relationship and may only be imputed to parties to the contract.") (internal citations omitted); *Middle Atl. Conference*, 353 F.Supp. at 1118 (finding that the relevant case law "do[es] not require that there be a specific contract to pay demurrage but it must arise out of contract and in practically every instance the obligation is only enforced upon persons who are parties to the contract of carriage."). A contractual relationship is therefore a condition precedent to demurrage liability.[14]

In other words, in order for a carrier to establish liability for demurrage, it must first establish that it had a contractual relationship regarding the railcars with the entity that detained the railcars. Only after a contractual relationship is established between the

[14] I note that there continues to be a "dearth of precise precedent" on this issue. *See Middle Atl. Conference*, 353 F.Supp. at 1116. Possibly, the dearth "is attributable to the rarity of attempts by carriers to hold persons liable for demurrage who were not parties to the contract." *Id.*

parties can demurrage liability be imposed against a party for detaining the railcars. If a contractual relationship with respect to the railcars is established, liability may then be imposed in one of three ways: via specific contractual provision regarding demurrage or, in the absence of a contractual provision, under statutory tariff or prevailing industry custom. *See Evans Prods. Co v. Interstate Commerce Comm'n,* 729 F.2d 1107, 1113 ("Liability for freight charges may be imposed only against a consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom.").

CSX does not seek to impose demurrage liability via specific contractual provision or industry custom. Rather, CSX justifies imposition of demurrage charges upon Novolog via its tariff. However, the cases are legion in holding that responsibility for demurrage charges cannot be imposed unilaterally against an individual or entity that was not a party to either a transportation contract or an independent contract in which that party specifically accepts liability for demurrage. *See South Tec,* 337 F.3d at 820 ("[B]eing listed by third parties as a consignee on some bills of lading is not alone enough to make [the warehouse] a legal consignee liable for demurrage charges, although it, coupled with other factors, might be enough to render [it] a consignee."); *Union Pac.,* 104 F.3d at 564 (holding that demurrage could not be assessed against a warehouse because it "was not a party to the underlying transportation contracts, and it did not separately agree contractually to

accept liability."); *Evans Prods.*, 729 F.2d at 1113 ("Attempts to support tariffs assessing freight charges against others tangentially involved in the shipment, such as warehousemen, pier operators, brokers, steamship agencies and others similarly situated have failed. No liability exists merely on account of being named in the bill of lading, or handling the property.") (citations and quotations omitted); *Pensacola*, 936 F.Supp. at 884 ("[O]nly a party to the rail transportation contract may be liable for demurrage. . . . The unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage."); *Matson*, 383 F.Supp. at 158 (N.D.Cal.1974) ("[O]ne not a party to the contract of transportation cannot be charged demurrage") (internal citations omitted); *Middle Atl. Conference*, 353 F.Supp. at 1116 (holding "that the proposed tariff was unlawful insofar as it attempted to impose liability for demurrage charges upon an agent who was not a party to the contract of transportation.").

CSX fails to establish the initial requirement that it entered into an agreement with Novolog regarding the transportation, handling, storage or other disposition of the railcars from which liability under statute/tariff may arise. Although Novolog asserts the validity of the Refund Contract, under which the parties may have had a contractual relationship and from which it may be possible for demurrage liability to arise, CSX asserts that the Refund Contract is not a valid contract. As discussed

below, I find there to be genuine issues of material fact as to whether the parties entered into any agreement under the terms of the Refund Contract. Moreover, because the parties fail to raise the issue, I decline to discuss whether the present demurrage liability may arise from a quasi-contractual theory. *See Matson,* 383 F.Supp. at 158-59; *Middle Atl. Conference,* 353 F.Supp. at 1125. For purposes of discussing demurrage liability, I find there to be genuine issues of material fact as to whether there was a contractual relationship between the parties.

C. Agency Relationship

Citing the decision of the Court of Appeals of New York, *Pennsylvania R.R. Co. v. Titus,* 109 N.E. 857 (N.Y.1915), and general principles of agency law, CSX asserts that an undisclosed agent of a consignee principal is liable for demurrage charges where it is designated as the consignee in the bill of lading. CSX thus argues that Novolog's failure to disclose any agency relationship it may maintain with its exporters or importers (the ultimate consignees) to CSX places Novolog in the position of responsibility for paying its demurrage charges. CSX appears to argue further that if "an agent for a disclosed principal is not liable to a third person for acts within the scope of the agency," *see Middle Atl. Conference,* 353 F.Supp. at 1120, then an agent for an undisclosed principal is liable to a third person for acts within the scope of the agency.

However, the Court of Appeals for the Seventh Circuit specifically rejected the theory that the general rule of agency law – that an agent who refuses to disclose the identity of its principal is personally liable for charges incurred on behalf of the principal – permits railroads to broaden their tariffs to reach non-consignee agents and held that this rule of law only applies where an agent actually is entering into a contract on behalf of the principal. *See Evans Prods.*, 729 F.2d at 1113; *see also South Tec,* 337 F.3d at 817; *Middle Atl. Conference,* 353 F.Supp. at 1120 (noting that "a careful reading of that section requires a conclusion that it speaks only to the 'nonliability' in certain narrow situations of warehousemen, and others similarly situated, who appear as consignees on the bill of lading, but in no way can be read to impose liability on an agent not a party to the contract."). I agree with the Seventh Circuit and find CSX's argument to the contrary unavailing.

Notwithstanding *Evans Products,* CSX persists in arguing that an agent of an undisclosed principal is liable for demurrage under statute. Citing 49 U.S.C. § 10743(a)(1), CSX argues that "[t]he only way a named consignee that is serving as an agent for the shipper can avoid liability for demurrage is to provide the carrier with written notice of its status as an agent on each shipment prior to delivery." Section 10743 provides:

> Liability for payment of *rates for transportation* for a shipment of property by a shipper or consignor to a consignee other than the

> shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property –
>
> > (A) of the agency and absence of beneficial title; and of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

(emphasis added). CSX's reliance on this statute is misplaced because Section 10743 relates only to the payment of rates for shipment of freight not demurrage and, as discussed above, demurrage charges are distinct from transportation rates.

D. Knowledge of Demurrage Practice

CSX also argues that Novolog should be liable for its demurrage tariff because: (1) it was intimately familiar with the rail industry's practice of imposing demurrage charges; (2) through its receipt of notices and requests for rail car, it implicitly confirmed that

it was the consignee for each bill of lading; and (3) it understood that when railcars pile up beyond the free time, demurrage charges will accrue. However, knowledge of the tariffs and/or the overbooking of its port for export and import is not sufficient to incur liability for the detention of those cars. *See Matson,* 383 F.Supp. at 158 (rejecting railroad's argument that connecting carrier should be liable for demurrage because although the connecting carrier "was not a stranger to the contracts of transportation" and "knew shipments would occasionally arrive unbooked or prematurely, [] this fact alone does not make [the connecting carrier] a party to the contract with the ensuing liabilities that would follow from that status.").[15] Moreover, the case law is clear that no industry-wide custom permits the imposition of demurrage charges against a nonparty that is unilaterally designated as the consignee. *See Evans Prods.,* 729 F.2d at 1113.

E. Prior Precedent

I find a review of the major cases in this area to be instructive. This case is analogous to *Illinois Central R.R. Co. v. South Tec Dev. Warehouse, Inc.,*

[15] CSX also argues-without legal authority-that Novolog should be liable for its demurrage charge because Novolog received a specific benefit from holding the railcars beyond the allotted free time, i.e. Novolog was able to continue to receive railcars and use CSX's railcars to store the surplus steel cargo as it struggled to unload all of the railcars.

337 F.3d 813 (7th Cir.2003). In *South Tec,* the Court of Appeals for the Seventh Circuit reversed the district court's grant of summary judgment in favor of plaintiff railroad carrier and remanded the case to the district court to determine whether defendant warehouse was the consignee of the shipments because it found that the district court improperly relied upon 49 U.S.C. § 10743(a)(1) to hold that an agent of a principal consignee is liable for demurrage charges unless it provides written notice of its status as agent to the carrier prior to shipment. *Id.* In *South Tec,* the railroad carrier sued a warehouse that was not a party to the transportation contract for demurrage charges arising out of the detention of its railcars resulting from congestion at the warehouse and its subsequent delays in unloading the paper cargo. *Id.* at 815-16. Here, Novolog is a noncontractual party who was unilaterally listed in the bills of lading as the consignee and whose congestion problems at its port caused delays in unloading/loading steel freight and, consequently, in releasing CSX's railcars.

Following *Ametek, Middle Atlantic Conference,* and *Evans Products,* the *South Tec* Court found that no industry-wide custom permits the imposition of demurrage charges against nonconsignees and determined that the warehouse "would be liable only if it were a consignee or if it contractually assumed responsibility for the demurrage charges." *Id.* at 820. Finding no evidence that the warehouse contractually assumed liability for demurrage, the court analogized *Pensacola* and *Matson,* to conclude that the unilateral

designation of a party as consignee on some bills of lading, without more, is not sufficient to make the party legally a consignee and, thus, liable for demurrage charges. *Id.* at 821-22. The Court remanded the case to the district court "to determine who was the legal consignee (or consignees) of the paper shipments in question and presumably liable for the demurrage charges" and encouraged the district court to "consider whether [the warehouse] contractually assumed responsibility for the demurrage charges." *Id.* at 822. Here, I find there to be a genuine issue of material fact as to whether Novolog entered into a contractual relationship with CSX for the disposition of its railcars or whether it contractually assumed liability for demurrage. Like the *South Tec* court, I conclude that the unilateral designation of Novolog as consignee on the relevant bills of lading is not sufficient to make Novolog a legal consignee for purposes of imposing demurrage liability.

The Court of Appeals' decision in *Union Pacific R.R. Co. v. Ametek, Inc.*, 104 F.3d 558 (3d Cir.1997), also is instructive. In affirming the district court's grant of summary judgment against plaintiff railroad carrier and in favor of defendant receiver of freight and the Interstate Commerce Commission, the Court held that the ICC and district court properly concluded that liability for demurrage tariffs could not be imposed upon an entity that was not a party to the transportation contract. *Id.* In *Ametek*, the railroad carrier unilaterally sought to impose demurrage tariffs against the receiver of freight who was merely

an agent of its customers and was not the consignor or consignee designated on the bills of lading. *Id.* at 559-60.

Following *Payment of Detention Charges, Eastern Central States,* 332 I.C.C. 585 (1968), *aff'd* 335 I.C.C. 537 (1969), and *Middle Atlantic Conference,* the *Ametek* Court held that demurrage liability could not be imposed upon a person who is not a party to the transportation contract or an agent for a disclosed principal acting within the scope of agency. *Id.* at 563. Finding that the receiver of freight was not a party to the transportation contract the Court concluded that the district court and ICC had not erred in determining "that liability for the demurrage tariff could not be imposed on [the receiver of freight] as the consignee or an agent of the consignor." *Id.* While acknowledging that a receiver of freight is free to assume demurrage liability via independent contract, the Court concluded that the parties' proposed, but unsigned, draft contract was not sufficient to support a "contractual exception to the agent nonliability rule." *Id.* at 564.

Similarly, in the instant case, Novolog was not a party to the transportation contract and is alleged to be acting as an agent for various unnamed consignees. CSX attempts to distinguish this case from *Ametek* by arguing that in contrast to the bills of lading in *Ametek,* which named the consignee as another entity in care of the receiver of freight, the bills of lading in the present case list Novolog as the consignee without any "care of" language and Novolog never took any

affirmative steps to disclose any agency relationship. CSX appears to assert the position that if demurrage liability cannot be imposed upon an agent for a disclosed principal acting within the scope of agency, then it can be imposed upon an agent who fails to disclose its principal. However, this position was specifically rejected in *Evans Products Co. v. Interstate Commerce Commission,* 729 F.2d 1107 (7th Cir.1984).

In *Evans Products,* the Court enforced the ICC's decision to allow plaintiff railroad carrier to charge for empty repair switches, but set aside the ICC's decision to allow the carrier to assess repair switching charges against defendant repair facilities because the repair facilities were not liable to for demurrage charges as they were neither owners, consignors, or consignees of the railcars. *Id.* In *Evans Products,* the carrier unilaterally sought to impose switching charges against repair facilities who receive the railcars from their owners or lessors. *Id.* at 1108-10.

Following *Matson* and *Middle Atlantic Conference,* inter alia, the *Evans Products* Court held that "[l]iability for freight charges may be imposed only against a consignor, consignee, or owner of the property or others by statute, contract, or prevailing custom." *Id.* at 1113 (internal citations omitted). The Court further held that "[a]ttempts to support tariffs assessing freight charges against others tangentially involved in the shipment, such as warehousemen, pier operators, brokers, steamship agencies, and

other similarly situated have failed. No liability exists merely on account of being named in the bill of lading or handling the property." *Id.* (internal citations omitted). Finding that although the repair facilities received damaged railcars and released the repaired cars on behalf of the owners/lessors, the repair facilities did not own the cars, they were not consignors or consignees, they did not determine the further disposition of the cars, and they had not contracted to assume liability for switching charges. *Id.* Rather, the Court found that the transportation contract was for shipment of goods and was between the shipper and the carrier alone. *Id.* The Court thus determined that there was no prevailing custom to charge repair facilities and that there was no liability under statute or contract. *Id.*

Moreover, the *Evans Products* Court rejected the argument that an agent of an undisclosed principal may be held liable for charges incurred on behalf of the principal and ruled that "the possibility that repair facilities acting as agents will withhold the identities of their principals, and thus will assume contractual responsibility for those repair switching charges, is too broad a generalization to find its way into a tariff blanketly placing ultimate liability on the repair facilities for all repair switches they order." *Id.* at 1113-14. The Court therefore concluded that "[r]epair facilities, neither consignor, consignee, or owner, nor obligated by statute, contract, or prevailing custom, may not be named as liable for repair

switching charges in [the carrier's] tariff." *Id.* at 1114. CSX does not address this precedent.

This case is also analogous to *CSX Transportation, Inc. v. City of Pensacola,* 936 F.Supp. 880 (N.D.Fla.1995). In *Pensacola,* the Court granted in part defendant port's motion for summary judgment against CSX and held that the port was not legally liable for demurrage because it was not a party to the transportation agreements between CSX and the shippers or receivers of the freight and the port was never listed on the bills of lading as owner, consignor, or consignee, but instead as the "care of" party. *Id.* CSX sued the port for demurrage charges arising out of the extended detention of its railcars at the port which resulted from unexpected congestion at the port. *Id.* at 882.

CSX argues that the *Pensacola* case is not applicable to the instant action because "the defendant in that case was not identified as a consignee on any bill of lading," but rather "was identified as the 'care of' party only." CSX argues that "[i]dentifying the defendant as a 'care of' party gave the carrier in the *Pensacola* case express notice that it was dealing with an agent only."

However, CSX cannot avoid the central issue of the *Pensacola* case: "whether the Port is liable to CSX for demurrage charges when the Port caused the delays giving rise to the demurrage, but when the Port is not a party to the contract of transportation with CSX." *Id.* Following *Matson* and *Middle Atlantic Conference,* the Court held that "only a party to the

rail transportation contract may be liable for demurrage" and "[t]he unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage." *Id.* at 884. Finding "nothing in the record to indicate that the Port contractually agreed in the transportation agreement to be responsible for CSX's demurrage," the Court determined that "CSX's demurrage claims lie against the parties shipping or receiving under the contract for transportation of the goods, not the Port." *Id.* Rejecting CSX's argument that the port was liable under statutory tariff, the Court held that notwithstanding the language of CSX's or the port's tariff "the law seems well-settled that only the parties to the contract for the transportation of goods are liable for demurrage." *Id.* at 885. The Court therefore concluded that "[a]s a matter of law, as a nonparty to the contracts for transportation of the goods the Port is not directly liable for demurrage under CSX's filed tariff." *Id.* Although Novolog was listed as the consignee on the bills of lading, rather than the "care of" party, it cannot be held liable for demurrage because there is insufficient evidence to demonstrate that it entered into a contractual relationship with CSX.

I also find this case to be analogous to *Southern Pacific Transportation Co. v. Matson Navigation Co.*, 383 F.Supp. 154 (N.D.Cal.1974). In *Matson,* plaintiff railroad sought demurrage charges against defendant connecting carrier as a result of its inability to receive the railcars because the shipment either was not booked on the connecting carrier or arrived before the

scheduled receiving period. *Id.* at 155-156. The Court denied the railroad's motion and granted the connecting carrier's cross motion for summary judgment and held "that a connecting carrier which appears neither as shipper nor consignee in a bill of lading cannot be held liable by the railroad carrier for demurrage where the shipment either was not booked on the connecting carrier or arrived before the scheduled receiving period." *Id.* at 157.

CSX argues that in contrast to *Matson*, where the connecting carrier was named as consignee on only a few shipments, Novolog is named on all of the shipments for which CSX is charging demurrage. CSX argues that the *Matson* court "placed significant weight upon the fact that the vast majority of the shipments at issue put the railroad on notice that the agent named as consignee for a few shipments was really just an agent, and not liable for demurrage." CSX argues that, by contrast, Novolog did not provide any notice of its agency status and was the only consignee listed for each shipment. I disagree with CSX's reading of *Matson*.

Finding that neither party had directed the Court to a controlling statute or prevailing custom, the *Matson* Court focused on the contracts involved. *Id.* at 156. Following *Middle Atlantic Conference*, the Court held: "The promise to pay demurrage need not be an express one, but may be implied in order to compensate the carrier for the use of its equipment. But, while the obligation to pay may be implied, the promise nonetheless arises out of the contractual

relationship and may only be imputed to parties to the contract." *Id.* (internal citations omitted). Rejecting the railroad's agency arguments, the Court determined that irrespective of the connecting carrier's agency status, it would not be liable for demurrage because it was not a party to the railroad bill of lading under which demurrage accrued. *Id.* With respect to the limited circumstances where the connecting carrier was named as consignee on the railroad bill of lading, the Court held that "where, as here, a connecting carrier-consignee is merely named in the railroad bill of lading without either more involvement on its part, or some culpability for the delay, it cannot be held liable to the railroad for demurrage. To hold otherwise on these facts would be to place a connecting carrier's liability totally within the shipper's control, a result the Court cannot sanction." *Id.* at 157 (internal citations omitted). Similarly rejecting the railroad's argument that the connecting carrier should be liable for demurrage because "it knew shipments would occasionally arrive unbooked or prematurely," the Court held that "this fact alone does not make [the connecting carrier] a party to the contract with the ensuing liabilities that would follow from that status." *Id.* at 158.

This case also is analogous to *Middle Atlantic Conference v. United States*, 353 F.Supp. 1109 (D.D.C.1972). In *Middle Atlantic Conference*, the Court affirmed the order of the ICC which "prohibit[ed] motor common carriers from specifying in their tariffs that certain warehousemen, pier operators, brokers, steamship

agencies, and others similarly situated . . . , who are neither consignors nor consignees, are to be liable under certain circumstances for charges for the undue detention (demurrage) of trucks being loaded or unloaded at their premises," and held that the proposed tariff of plaintiff motor carrier association was unlawful insofar as it attempted to impose demurrage liability upon an agent who was not a party to the transportation contracts. *Id.* at 1111.

Upon a comprehensive review of the pertinent case law history, the *Middle Atlantic Conference* Court held that "[b]efore such transportation-related assessments as detention charges can be imposed on a party on a prescribed basis there must be some legal foundation for such liability outside the mere fact of handling the goods shipped." *Id.* at 1118. Specifically, the Court stated that liability "must be founded either on contract, statute or prevailing custom. The adjudicated cases do not require that there be a specific contract to pay demurrage but it must arise out of contract and in practically every instance the obligation is only enforced upon persons who are parties to the contract of carriage." *Id.* (internal citations omitted). Rejecting an intervening plaintiff's argument that the right to demurrage exists independent of a contractual relationship, the Court held that "demurrage may be assessed *against the parties to the transportation contract* (or against the merchandise) without the necessity of there being and specific independent contract to pay demurrage." *Id.* at 1119 (emphasis in original). Acknowledging

that "parties to a contract of carriage are perfectly free among themselves to contract with respect to the payment of demurrage," the Court specified that "where they have not become contractually obligated to pay demurrage because common law principles exonerate them from liability, and they are not made liable by statute or custom, liability cannot then be imposed upon them legislatively through the device of a tariff." *Id.* at 1120. Raising the agency issue sua sponte the Court held that "an agent for a disclosed principal is not liable to a third person for acts within the scope of the agency." *Id.* at 1120-21. The Court therefore concluded that the motor carrier association's unilateral attempt to impose demurrage liability on a party outside the transportation contract was unlawful. *Id.* at 1126.

The only case that arguably supports CSX's case is *Shaver Trans. Co. v. Louis Dreyfus Corp.,* 414 F.Supp. 1040 (D.Or.1976). In *Shaver,* the Court held, inter alia, that defendant grain merchant was liable to plaintiff transportation company for demurrage charges arising out of the overdue detention of the transportation company's barge because although the grain merchant was not a party to the transportation contract it was the ultimate purchaser and consignee of the grain cargo and frequently had payed demurrage charges as a matter of custom. *Id.*

Rejecting the grain merchant's initial arguments that it could not be liable for demurrage by statute because the tariff was invalid or by custom because no custom existed, the *Shaver* Court held that the

tariff was not invalid and that "there was a long established custom in the grain trade . . . that the consignee who unload a barge is required to pay demurrage for delays in unloading at the consignee's facilities." *Id.* at 1043. Rejecting the grain merchant's final argument that it "cannot be liable for demurrage by contract because it was not a party to [the transportation] contracts," the Court found that the grain merchant was the ultimate purchaser and consignee of the grain and concluded that the grain merchant was liable for demurrage under the applicable tariff and custom of which it was well aware and by which it frequently paid demurrage. *Id.*

This case is distinguishable from the present action. Although the *Shaver* court found that the grain merchant was not a party to the transportation contract, it implicitly found that it was a party to a contract for the purchase of the grain as it was the ultimate purchaser and consignee of the grain and frequently paid demurrage liability when barges were detained. In view of this distinction and the other cases discussed above, I hold that the unilateral designation of an entity as consignee on bills of lading is not sufficient to make that entity a legal consignee for purposes of imposing demurrage liability; demurrage liability must arise out of a contractual relationship regarding the railcars for which demurrage liability is sought.

F. Recourse

CSX argues that "if the court rules that Novolog is not liable for demurrage, it has created an untenable situation for the rail industry. In effect, Novolog could order in or receive a rail car, as consignee, and then keep it indefinitely, use it exclusively for storage on its facility, or even sell it for scrap! The rail carrier would have no recourse." I disagree.

This is not a case of *damnum absque injuria.* As discussed above, CSX may have legal recourse against Novolog via tariff for demurrage charges if it can first establish that it had a contractual relationship with Novolog regarding the movement or handling of the railcars that were detained. However, there remain genuine issues of material fact in this case as to whether the parties ever had such a contractual relationship from which demurrage liability may arise. Should CSX establish such a contractual relationship at trial, it may then proceed to impose demurrage liability against Novolog via its tariff. To the extent it is found that CSX and Novolog did not have a contractual relationship, CSX may pursue its claim for demurrage against another party with which it did have a contractual relationship relating to the movement or handling of these railcars. CSX's motion for summary judgment will be denied with respect to demurrage liability.

Novolog's motion for summary judgment with respect to demurrage liability similarly will be denied because Novolog asserts that CSX entered into a

contract with it for switching services. A reasonable jury could infer from this contractual relationship, if established at trial, that Novolog implicitly accepted statutory liability for detention of the railcars. In other words, such a contractual relationship, if established at trial, may satisfy the initial requirement for demurrage and provide a sufficient basis from which CSX may impose demurrage liability via its tariff.

II. *Liability for Switching Services (the Refund Contract)*

Novolog counterclaims that CSX breached the unsigned Refund Contract, under which it promised to pay Novolog twenty one dollars per loaded car for its switching services. The Refund Contract provides in Paragraph 9 that the contract "shall be construed (except for matters referring to federal laws or regulations) according to the laws of the State of Florida."

Notwithstanding this provision, CSX argues that Pennsylvania contract law applies. However, there do not appear to be substantial differences between Florida and Pennsylvania contract law. To prevail on a breach of contract claim under Pennsylvania law, plaintiff must first prove the existence of a valid contract. *See Matthews v. Unisource Worldwide, Inc.*, 748 A.2d 219, 221 (Pa.Super.Ct.2000). Pennsylvania law is clear that "a contract is created when there is mutual assent to the terms of a contract by the parties with the capacity to contract." *Shovel Transfer and Storage, Inc. v. Pa. Liquor Control Bd.*, 739 A.2d

133, 136 (1999) *citing Taylor v. Stanley Co. of Am.*, 158 A. 157 (1932). "As a general rule, signatures are not required unless such signing is expressly required by law or by the intent of the parties." *Id. citing L.B. Foster Co. v. Tri-W Constr. Co.*, 186 A.2d 18, 19 (Pa.1962). Moreover, "an offer may be accepted by conduct and what the parties do pursuant to the offer is germane to show whether the offer is accepted." *Hartman v. Baker*, 766 A.2d 347, 351 (Pa.Super.Ct.2000).

Under Florida law, "[a] contract is created where the last act necessary to make a binding agreement takes place. Where one contracting party signs the contract, and the other party accepts and signs the contract, a binding contract results." *D.L. Peoples Group, Inc. v. Hawley*, 804 So.2d 561, 563 (Fla.Dist.Ct.App.2002). However, "[a] contract may be binding on a party despite the absence of a party's signature. The object of a signature is to show mutuality or assent, but these facts may be shown in other ways, for example, by the acts or conduct of the parties." *Integrated Health Servs. of Green Briar, Inc. v. Lopez-Silvero*, 827 So.2d 338, 339 (Fla.Dist.Ct.App.2002) *quoting Gateway Cable T.V., Inc. v. Vikoa Contr. Corp.*, 253 So.2d 461, 463 (Fla.Dist.Ct.App.1971); *Sosa v. Shearform Mfg.*, 784 So.2d 609 (Fla. 5th DCA 2001) ("Even if parties do not sign a contract, they may be bound by the provisions of the contract, if the evidence supports that they acted as if the provisions of the contract were in force.").

Here, CSX argues that it never entered into the Refund Contract with Novolog because there is no

evidence to demonstrate: (1) that CSX drafted the agreement; (2) that CSX signed the draft agreement; (2) that Novolog sent the Refund Contract back to CSX; (4) when and in what manner the Refund Contract was entered into; (4) that the parties agreed to the terms of the Refund Contract; and (5) that CSX acted according to the Refund Contract.[16] Notwithstanding the lack of CSX's signature, Novolog asserts that the parties entered into the Refund Contract because: (a) CSX drafted and forwarded the contract to Novolog; (b) Novolog accepted and signed the contract in its original form; and (c) Novolog performed the rail switching services according to the contract.[17]

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[16] CSX also argues that to the extent that there was a meeting of the minds on the Refund Contract, the contract terms do not obligate CSX to pay for the switching fees because Paragraph 4, third bullet point, of the Refund Contract states that "[r]efunds will not be honored unless all line-haul rates and accessorial charges have been paid" and Novolog has failed to pay demurrage charges for detaining CSX's railcars. Novolog argues that CSX's interpretation should be rejected because this provision is ambiguous and should be construed against CSX as the drafter. I do not address this issue because I find there to be genuine issues of material fact with respect to whether the parties entered into the Refund Contract.

[17] I must note that counsel for Novolog simply has cut and paste, word for word, large portions of his arguments with respect to this issue from his motion for summary judgment into his response brief. Response, reply, and surreply briefs are intended to shed greater light on the substantive issues and address new arguments or nuances raised by opposing counsel; they are not fora for reiterating word for word one's prior argument.

Without any evidence to demonstrate that CSX accepted and signed the agreement or acted pursuant to its terms, there is insufficient evidence to establish as a matter of law that the parties entered into a valid contract for switching services. Accordingly, Novolog's motion for summary judgment with respect to the Refund Contract will be denied. Similarly, the existence of the draft contract signed by Novolog creates a genuine issue of material fact that precludes CSX's cross motion.

An appropriate order follows.

ORDER

AND NOW, this 24th day of May 2006, upon consideration of the parties' cross motions for summary judgment, responses, replies, and surreplies thereto as well as the transcript of the parties' April 27, 2006 oral argument in this case, and for the reasons set forth in the accompanying memorandum, it is ORDERED that the parties' cross motions for summary judgment are DENIED. It is further ORDERED that CSX's motion for leave to file a supplemental brief is DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CSX TRANSPORTATION CO.	:	CIVIL ACTION
v.	:	NO. 04-4018
NOVOLOG BUCKS COUNTY	:	(Filed Jul. 12, 2006)

AND NOW, this 12th day of July 2006, upon review of CSX's admissions of fact, in which CSX stated that "other than Novolog being the named consignee on bills of lading, and Novolog having accepted delivery of the loaded rail cars by CSX, CSX had no separate contractual relationship with Novolog governing the movement and/or disposition of the detained rail cars," and, in accordance with my May 24, 2006 memorandum and Order, it is ORDERED that JUDGMENT as a matter of law is ENTERED in favor of Novolog and against CSX with respect to CSX's demurrage claim.

/s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CSX TRANSPORTATION CO.	:	CIVIL ACTION
v.	:	NO. 04-4018
NOVOLOG BUCKS COUNTY	:	

ORDER

With respect to my June 26, 2006 ruling on the timeliness of plaintiff's motion for reconsideration of my May 24, 2006 memorandum and Order, I confess error. Plaintiff's motion for reconsideration was not untimely under Federal Rule of Civil Procedure 59(e). Rather, the motion for reconsideration was untimely under Local Rule of Civil Procedure 7.1(g) as it was filed twenty business days (excluding Saturdays, Sundays, and legal holidays) after my memorandum and Order and plaintiff has failed to demonstrate any grounds on which to excuse the timeliness requirement. Moreover, plaintiff has failed to demonstrate that I committed a clear error of law in my May 24, 2006 memorandum and Order.

AND NOW, this 10th day of July 2006, it is therefore ORDERED that my June 26, 2006 Order is modified as follows: "Plaintiffs cross motion for reconsideration is DENIED for failure to comply with Local Rule of Civil Procedure 7.1(g) and for failure to demonstrate that I committed a clear error of law."

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CSX TRANSPORTATION CO.	:	CIVIL ACTION
v.	:	NO. 04-4018
NOVOLOG BUCKS COUNTY	:	

ORDER

AND NOW, this 6th day of July 2006, upon consideration of plaintiff's motion for reconsideration of the June 26, 2006 Order denying plaintiff's alternative motion for limited referral to the United States Surface Transportation Board, it is ORDERED that plaintiffs motion for reconsideration is DENIED.

s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.
Emergency Judge for Judge
Thomas O'Neill

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CSX TRANSPORTATION CO.	:	CIVIL ACTION
v.	:	NO. 04-4018
NOVOLOG BUCKS COUNTY	:	

ORDER

AND NOW, this 26th day of June 2006, upon consideration of plaintiff's opposition to defendant's motion for reconsideration and cross motion for reconsideration or, in the alternative, motion for limited referral to the United States Transportation Board, it is ORDERED as follows:

1. Plaintiff's opposition to defendant's motion for reconsideration is DISMISSED as moot;

2. Plaintiff's cross motion for reconsideration is DENIED as untimely, *see* Fed. R. Civ. P. 59(e) ("Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."); *see also* Fed. R. Civ. P. 6(b); *Kraus v. Consol. Rail Corp.*, 899 F.2d 1360, 1362 (3d Cir. 1990) ("Rule 6(b) . . . explicitly provides that the district court may not extend the time for taking any action under Rule 59(e)."") (internal citations and quotations omitted); and

3. Plaintiff's alternative motion for limited referral to the United States Transportation Board is DENIED because my memorandum and Order of

May 24, 2006 is not tantamount to an attack upon the reasonableness of the tariff terms.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.

CSX
TRANSPORTATION
TARIFF CSXT 8100

DEMURRAGE SECTION

SECTION VIII-C
(Cancels Section VIII-B)
DEMURRAGE PROVISIONS

CSXT bases its freight transportation prices on the expectation that railcars furnished to customers will be promptly loaded and unloaded. The purpose of this Section is to describe how the time railcars are under the control of customers is defined, and to specify the prices that CSXT charges should a customer retain control of railcars beyond the time incorporated into our freight rates.

(N) – Correction of an update.

ISSUED DECEMBER 19, 2002 EFFECTIVE DECEMBER 21, 2001

2nd REVISED VIII-C PAGE 2
Cancels 1st REVISED VIII-C PAGE 2

(C) APPLICATION – ITEM 8000

This section applies to all CSXT served customers and covers all railroad and private marked freight car(s) held for or by the customer(s), with the following exceptions:

A. Coal and coke governed by Tariff CSXT 8200-series

B. Car(s) moving into any CSXT TransFlo terminal, governed by TransFlo Price list 9300

C. Car(s) used in the shipment of commodities purchased by CSXT ("Company Material")

D. Private car(s), on private tracks, except as provided in Item 8050

E. Empty private car(s)

F. Car(s) containing refused or unclaimed freight to be sold by CSXT

G. Empty car(s) rejected as unsuitable for loading

H. Multi-level equipment

DEMURRAGE DEFINITIONS – 8010

Refer to the demurrage definitions at the end of this section.

NOTIFICATION TO CONSIGNOR OR CONSIGNEE – ITEM 8020

A. CSXT will furnish the following notifications as indicated:

1. Cars for other than public delivery tracks:

a. Notice of constructive placement if car(s) are held on CSXT tracks due to reasons attributable to the consignor or consignee.

b. Delivery of car(s) upon tracks of consignee will constitute notice.

c. When two or more parties, each performing their own switching, take delivery of cars from the same interchange track, notice will be given when cars are placed on the interchange track.

2. Cars for public delivery tracks:

a. Notice will be given to the party entitled to receive notification when car(s) is actually placed.

3. Cars stopped in transit :

a. Notice will be given to the consignor, consignee or owner responsible for the car being stopped upon arrival of the car at the point of stoppage.

4. Refused loaded car(s):

a. When a loaded car is refused at destination, CSXT will give notice of such refusal to the consignor or owner.

B. Notification may be given in writing or electronically, and will contain the following:

1. Car initials and number.
2. If lading transferred en route, the initials and number of the original car.
3. Commodity.

(C) – Change in wording which results in neither increase nor reduction in charges

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ISSUED DECEMBER 19, 2002 EFFECTIVE DECEMBER 20, 2001

(N) 1st REVISED VIII-C PAGE 3
Cancels ORIGINAL VIII-C PAGE 3

NOTIFICATION TO CSXT – ITEM 8030

A. CSXT will accept forwarding instructions, empty release information or, other disposition twenty-four hours a day at the CSXT Customer Operations Center (1-800-327-5405).

B. When electronic or mechanical devices are used to furnish notification to CSXT, the recorded date and time that the instructions are received will govern.

HANDLING OF SHIPPER ASSIGNED CAR(S) – ITEM 8035

A. APPLICATION

1. The shipper must provide advance notice for all car assignment requests, in writing, in the following form:

   (Company Name) hereby requests the assignment of car(s) (Enter the number of cars

here), (Enter car type here), located at (Enter location here). If said assignment, is granted by CSXT, it is understood that the car(s) will be subject to the rules and charges in CSXT Tariff 8100-series.

_____
(Signed & Date)

_____
(Title)

Accepted by CSXT on (Enter date here), (Enter the number of cars here) car(s) will be placed in this assignment.

BY: _____

TITLE: _____

2. Assignment of car(s) will be at the sole discretion of CSXT.

3. When CSXT agrees to an assignment of car(s), the assignee will be notified by the accepted return of the assignee's written request.

B. RELEASE OF CAR(S) FROM ASSIGNMENT

1. The assignee may release car(s) from assignment by providing notice to CSXT, in writing or confirmed in writing, at least one (1) day prior to the date of the desired release.

2. CSXT will select the car(s) to be removed from the assignment.

3. Assignee will not be permitted to release car(s) until all shipper-owned appurtenances have been removed.

(N) – Correction of an update.

ISSUED JANUARY 4, 2002 EFFECTIVE DECEMBER 21, 2001

3rd REVISED VIII-C PAGE 4
Cancels 2nd REVISED VIII-C PAGE 4

ACCOUNTABILITY AND CHARGES

The shipper assigned car(s) will be subject to the "car(s) held for loading" provisions in Item 8040.

(c) PRIVATE CAR APPLICATION FOR RAILROAD MARKED, CARS – ITEM 8038

CSXT is aware that shippers, acting as consignors and/or consignees, may sometimes lease railcars from other railroads for shipments that may originate or terminate on CSXT. Such railcars normally contain the reporting marks of the lessor railroad. In order to avoid the assessment of demurrage charges by GSXT when such railcars are located on private or leased tracks, on CSXT rail lines, it is necessary that shippers apply to, and receive the approval of, CSXT for the designation of such cars as "private" cars for the purposes of demurrage.

A. APPLICATION:

1. Shippers must submit a written application that is received by CSXT not less than thirty

(30) days prior to the date that the shipper desires the "private" car designation to take effect. The application must include:

- The name of the shipper
- The name of the lessor railroad
- A listing of the reporting marks of the railcars leased by the shipper from the lessor railcar
- The type of railcar
- The length of time requested for the private railcar designation

The application must be sent to CSXT at the following address:

CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
Attn: Vice President Car Management J-887

2. Upon the request of CSXT, shipper agrees to furnish a copy of the applicable railcar lease to CSXT.

3. CSXT will provide a written reply to each application within thirty (30) days of receipt of the application. CSXT, in its sole discretion may accept or reject the application in whole or in part. CSXT may accept a smaller number of railcars than requested and/or for a shorter amount of time.

(C) – Change in wording which results in neither increase nor reduction in charges

ISSUED DECEMBER 19, 2002 EFFECTIVE DECEMBER 20, 2002

* * *

2nd REVISED VIII-C PAGE 7
Cancels 1st REVISED VIII-C PAGE 7

C. After tender until date of refusal on: 1. Refused loaded car(s) (consignee)

D. After tender until date of disposition on: 1. Refused loaded car(s) (consignor)

E. After tender until release or placement on private tracks on:

1. Leaded private car(s) – while held on railroad tracks.

2. Empty car(s) moving as freight with STCC 37 422 XX

CREDITS:

Credits will be allowed for each car released, or on which disposition is provided in accordance with the Table of Charges in Item 8075.

(B) B. Cancel – Account Obsolete

DEMURRAGE PLAN – ITEM 8070

A. Settlement at charges will be made monthly on all car(s) released during each calendar month.

B. Credits earned and demurrage days accrued by customers having facilities at separate stations cannot be combined.

C. Credits earned, and demurrage days accrued, will be calculated separately in accordance with the Table of Charges in Item 8075.

D. Excess credits earned for one demurrage transaction cannot be used to offset days for another demurrage transaction.

E. Excess credits earned cannot be used to offset demurrage between loading and unloading credits.

F. Excess credits earned in one calendar month cannot be used to offset demurrage days in another calendar month.

G. Unless otherwise advised, in WRITING, that another party is willing to accept responsibility for demurrage, consignor at origin or consignee at destination will be responsible for the payment of demurrage charges.

H. **Calculation of charges:**

1. Total demurrage days for all car(s) released will be added

2. Total credits for all car(s) released will be added

3. If total days exceed the total credits, calculation of charges will be made as follows:

a. Subtract number of total credits from total demurrage days to determine number of chargeable days

b. Chargeable days will be assessed charges in accordance to the Table of Charges in Item 8075

(B) - Cancel - Account Obsolete

ISSUED NOVEMBER 25, 2002 EFFECTIVE NOVEMBER 26, 2002

* * *

(N) PAGE: 11

DEMURRAGE DEFINITIONS

The following definitions define and govern the provisions outlined in this tariff.

ACTUAL PLACEMENT – When a car(s) is placed in an accessible position for loading or unloading or, at a point designated by the consignor or consignee.

CONSIGNEE – The party to whom a shipment is consigned, or the party entitled to receive the shipment.

CONSIGNOR – The party in whose name a car(s) is ordered; or the party who furnishes forwarding directions.

CONSTRUCTIVE PLACEMENT – When a car(s) cannot be actually placed due to any condition attributable to the consignor or consignee including order

notify and in-bond shipments, such car(s) will be held on CSXT's tracks and notice will be provided to the consignor or consignee that the car(s) is held awaiting disposition instructions. Car(s), placed by CSXT on private or other than public delivery tracks, including lead tracks serving the consignor or consignee, will be considered constructively placed without notice.

CREDIT – A non-chargeable demurrage day. Credits may be earned when a car(s) is released by the customer and is used to offset chargeable demurrage days.

DEMURRAGE DAY – A twenty-four (24) hour period (calendar day), or part thereof, commencing 0001 after tender.

DISPOSITION – Information, including forwarding instructions or release, that allows the railroad to either tender or release the car(s) from the consignor's or consignee's account.

DIVERSION – An order provided by the consignor instructing that a car(s) be delivered to a location other than the one indicated on the original forwarding instructions.

EMPTY CAR(S)ORDERED AND NOT USED – Empty car(s), placed for loading as ordered, and subsequently released without being used in transportation service.

EMPTY RELEASE INFORMATION – Advice provided by the consignee to authorized personnel, that the car(s) is unloaded and available. This information must

include the identity of the consignee, party furnishing information, and the car(s) initial and number.

FORWARDING INSTRUCTIONS – Shipping instructions provided at the point of loading that contain all of the necessary information to transport the shipment to its final destination.

LEASE TRACK – Track(s) assigned to a user through a written agreement Lease tracks will be treated the same as private tracks.

(N) No change

ISSUED DECEMBER 20, 2001 EFFECTIVE DECEMBER 21, 2001

(N) PAGE 12

LOADING – The complete or partial loading of a car(s) in conformity with loading and clearance rules and, the furnishing of forwarding instructions.

LOADED CAR(S) – A car(s) that is completely or partially loaded.

NOTIFICATION – When required, written or verbal notification will be furnished to the parties entitled to receive notice that the car(s) is available for loading, unloading, or otherwise impacted by demurrage provisions.

ORDER DATE – The date that the consignor requests empty car(s) to be furnished for loading.

OTHER THAN PUBLIC DELIVERY TRACK – Any trackage assigned for individual use, including privately owned or leased tracks.

PARTIAL UNLOADING – The partial unloading of a car(s) and furnishing of the proper forwarding or handling instructions.

PRIVATE CAR(S) – A car(s) bearing other than railroad reporting marks that is not railroad-controlled.

PRIVATE TRACK – Tracks that are now owned or leased by the railroad.

PUBLIC DELIVERY TRACK – Track that is open to the general public for loading and unloading.

RAILROAD-CONTROLLED CAR(S) – A car(s) bearing other than railroad reporting marks that is either leased or controlled by a railroad.

RECONSIGNMENT – An order provided by consignor to bill a car(s) to other than the original consignee. (An order to turn over the car(s) to another party that does not require any additional movement of the car(s), is not a reconsignment).

REFUSED LOADED CAR(S) – When the original loaded car(s) is refused at destination without be unloaded.

RELOADING – When a car(s) is held for loading after being released as an empty.

RESHIPMENT – A new document by which the entire original shipment is forwarded in the same car(s) to another destination.

SERVING YARD – A classification yard where the local train serving the customer originates.

SHIPPER ASSIGNED CAR(S) – Specific empty car(s) assigned to a particular shipper for their exclusive use.

STOPPED IN TRANSIT – When a car(s) is held en route due to any condition attributable to the consignor, consignee, or owner.

(N) No change

ISSUED DECEMBER 20, 2001 EFFECTIVE DECEMBER 21, 2001

(N) PAGE 13

TENDER – The notification, actual or constructive placement, of an empty or loaded car(s).

TIME – Local time is applicable and is expressed on the basis of the 24-hour clock.

Example: 12:01 AM is expressed as 0001 Hours.

UNLOADING – The complete unloading of a car(s), and the advice received from the consignee that the car(s) is empty and available to the railroad.

(N) No change

ISSUED DECEMBER 20, 2001 EFFECTIVE DECEMBER 21, 2001

CSX TRANSPORTATION
Marketing Services – Price Management
500 Water Street
Jacksonville, FL 32202

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNION PACIFIC RAILROAD COMPANY, Plaintiffs,	§	
v.	§	CIVIL ACTION NO.
CARRY TRANSIT, INC., as trade name for SUPERIOR CARRIERS, INC., Defendants.	§	3:04-CV-1095-B

MEMORANDUM ORDER

The Court is presented with the following motions: 1) Carry Transit's Motion for Summary Judgment (doc. 35), filed June 15, 2005; and 2) Union Pacific's Motion for Summary Judgment (doc. 40), filed June 22, 2005. For the reasons explained below, the Court GRANTS Carry Transit's motion and DENIES Union Pacific's motion.

I. Factual and Procedural Background

This case arises from a dispute over demurrage charges between an interstate rail carrier and a transloader/food grade bulk carrier. Plaintiff Union Pacific is an interstate rail carrier. (Pl.'s First Am. Compl. ["Compl."] at ¶ 3). Defendant Carry Transit is a transloader and food grade bulk carrier. (App. in Supp. Def.'s Mot. Summ. J. ["CT App."] at 1). Carry

Transit's principal place of business is in Illinois, but it has facilities throughout the United States, including a food grade transloading facility in Arlington, Texas. (*Id.*). Carry Transit has eight customers in the food grade industry that contract with Union Pacific to transport their products to Carry Transit's Arlington facility. (*Id.*). Once at Carry Transit's facility, the products are unloaded from the rail cars and onto Carry Transit trucks, or into storage tanks for later transport in Carry Transit trucks. (*Id.* at 2).[1] Carry Transit's trucks then deliver the products to points designated by its customers, (*Id.*). Carry Transit does not contract with Union Pacific for the transportation of its customers' products, and it does not own the products transported in the rail cars. (*Id.*).

This lawsuit arises out of the fact that certain of Carry Transit's customers – the shippers of food grade products transported to Carry Transit's Arlington facility via Union Pacific rail cars – name Carry Transit as the consignee on bills of lading provided to Union Pacific. Carry Transit contends that it is not the consignee for these products, but that it is rather what is known in the transportation industry as the "care of" party. (*Id.* at 3). Carry Transit states that it has advised its customers that it should be designated as the "care of party on bills of lading provided to Union Pacific, and its customer contracts provide

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[1] In some instances, however, Carry Transit's customers arrange for another trucking company to pickup the products from Carry Transit's facility for delivery. (CT App. at 2).

that it shall be designated only as the "care of" party. (*Id.*). Carry Transit claims that it has never authorized any of its customers to designate it as the consignee of any product shipped in a rail cars [sic] to its Arlington facility. (*Id.*).

According to Union Pacific, from May 2001 continuing to date, it has moved freight from various shippers (Carry Transit's customers) to its receiving yard in Arlington, Texas. (Pl.'s Resp. Brief to Def.'s Mot. Summ. J. ["Pl.'s Resp. Brief"] at 1; Compl. at ¶ 6). Once there, Carry Transit ordered the rail cars into its facility, unloaded the freight, and returned the empty cars to Union Pacific. (Pl.'s Resp. Brief at 1-2). However, Union Pacific claims that Carry Transit failed to return the rail cars within the allotted "free time" established by Union Pacific's published tariff. (Compl. at ¶ 6). As a result, Union Pacific contends that Carry Transit, named as consignee in the bills of lading provided to it, has incurred and is liable for demurrage charges in the amount of $778,200.00, which continue to accrue. The parties have filed cross motions for summary judgment, on which the Court heard oral argument on October 21, 2005.

II. Summary Judgment Legal Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that the

movant is entitled to judgment as a matter of law. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.*

The burden is on the summary judgment movant to prove that no genuine issue of material fact exists. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, the summary judgment movant need not support its motion with evidence negating the non-movant's case. Rather, the movant may satisfy its burden by pointing to the absence of evidence to support the non-movant's case. *Id.*; *Little*, 37 F.3d at 1075.

Once the movant has met its burden, the non-movant must show that summary judgement is not appropriate. *Little*, 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The non-moving party must "come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita*, 475 U.S. at 587 (emphasis in original) (quoting FED. R. CIV. P. 56(e)). To determine whether a genuine issue exists for trial,

the court must view all of the evidence in the light most favorable to the non-movant, and the evidence must be sufficient such that a reasonable jury could return a verdict for the non-movant. *Munoz v. Orr*, 200 F.3d 291, 302 (5th Cir. 2000); *Anderson*, 477 U.S. at 248.

III. Analysis

In simple terms, demurrage is a charge imposed by a rail carrier on a shipper or consignee for failing to unload and return rail cars within the specified period of "free time"[2] prescribed by the carrier's published tariff. *Cleveland Elec. Illuminating Co. v. Interstate Commerce Comm'n*, 685 F.2d 170, 171 (6th Cir. 1982); *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F.Supp. 880, 883 (N.D. Fla. 1995). Here, the period of free time allotted by Union Pacific's tariff was two days. (App. in Supp. Pl.'s Mot. Summ. J. at Ex. A). The parties do not dispute that Carry Transit received delivery of a number of Union Pacific rail cars but failed to timely return them within the specified free time. The question is whether Carry Transit is liable for those charges. The answer to that question turns on whether Carry Transit was an actual consignee of the goods transported by Union

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[2] "Free time is that period of time which, under normal circumstances, affords the shipper a sufficient opportunity to unload a car and release it to the railroad." *Cleveland Elec.*, 685 F.2d at 171 n.1.

Pacific and accepted by Carry Transit at its Arlington facility.

Generally, demurrage charges cannot be assessed against a party that is neither a party to the transportation contract nor a consignee. *Illinois Cent. R.R. Co. v. S. Tec Dev. Warehouse, Inc.*, 337 F.3d 813, 820 (7th Cir. 2003); *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558, 563 (3d Cir. 1997); *CSX Transp.*, 936 F.Supp. at 884; *Middle Atl. Conference v. United States*, 353 F.Supp. 1109, 1117-19 (D.D.C. 1972). Here, Carry Transit was not a party to the transportation contracts between Union Pacific and the shippers of the products transported to Carry Transit's Arlington facility. (CT App. at 2). Union Pacific claims, however, that somehow Carry Transit became a party to the contracts between Union Pacific and the shippers by virtue of the fact that Carry Transit was named as the consignee in bills of lading provided to Union Pacific by the shippers. (Pl.'s Resp. Brief at 4). Union Pacific offers no legal authority in support of its view that simply being named as a consignee in a bill of lading between two third parties makes the purported consignee a party to the transportation contract. The Court can perceive no legal principle whereby Carry Transit can be deemed a parry to the transportation contracts entered into between Union Pacific and the shippers.

Independent of the question of whether Carry Transit is a party to the transportation contracts, Union Pacific argues that Carry Transit is liable for demurrage because it was listed as the consignee on

the relevant bills of lading. It is true that demurrage charges may ordinarily be assessed against a consignee. *See S. Tec*, 337 F.3d at 820; *City of New Orleans v. S. Scrap Material Co., Ltd.*, 491 F.Supp. 46, 48 (E.D. La. 1980). The core issue here, however, is whether the unilateral naming of Carry Transit as consignee by the shippers renders Carry Transit an actual consignee liable for demurrage charges.[3]

Courts have directly considered whether simply being listed as the named consignee is sufficient to render a party an actual consignee. In *CSX Transportation, Inc. v. City of Pensacola, Florida*, 936 F.Supp. 880 (N.D. Fla. 1995), a rail carrier sought to hold the Port of Pensacola liable for demurrage charges. *Id.* at 882. The Port received goods intended for export from

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[3] Union Pacific contends that "[a] named consignee's acceptance of a rail car serves as its agreement to the liability with respect to handling the rail car, including liability for demurrage charges." (Pl.'s Resp. Brief at 4). In support, Union Pacific offers *Smith v. Mandel*, 66 F.R.D. 405 (D.S.C. 1975). Apart from misciting the court (this is a district court case, not a Fourth Circuit case), the page number (there is no page 472), and the year (the case was decided in 1975, not 1922), this case is unavailing to Union Pacific. The case mentions in passing that another district court held that a consignee has an obligation to pay freight charges on goods delivered to it. (*Id.* at 410). Carry Transit does not appear to quarrel with that general proposition. The issue here, however, is not whether a consignee may be held liable for demurrage – that much is clear – but rather whether Carry Transit is a consignee. *Callaway v. Atchison, T.& S.F. Ry. Co.*, 35 F.2d 319, 320 (8th Cir. 1929), mentioned by counsel for Union Pacific during oral argument, also fails to shed light on that precise issue.

the United States, after which time the goods were loaded onto vessels for oceanic transport. *Id.* The Port first argued that it could not be held liable for demurrage because it was not a party to the transportation contract between the carrier and the shipper. *Id.* at 883. The court agreed. *Id.* at 884. Significantly, however, the carrier also asserted that the Port was a consignee under the terms of its published tariff. (*Id.*). Even assuming that the Port would be a consignee under the tariff, the court held that "[t]he unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage." *Id.* The court could find no evidence in the record indicating that the Port contractually agreed in the transportation agreement to be responsible for demurrage, and it concluded that the carrier's "demurrage claims lie against the parties shipping or receiving under the contract for transportation of the goods, and not the Port." *Id.*

In *Southern Pacific Transportation Co. v. Matson Navigation Co.*, 383 F.Supp. 154 (N.D. Ca. 1974), a rail carrier sought to impose demurrage charges upon Matson, an unloader and transporter of cargo, which received deliveries in Oakland for shipment overseas. *Id.* at 155. In the two bills of lading at issue, the inland shipper appeared as the consignor, and, in most instances, the Hawaii purchaser appeared as the consignee. *Id.* Matson was listed as the "care of" party. *Id.* In some cases, however, the shipment was consigned to Matson on the railroad bill of lading. *Id.* Demurrage charges arose because each of the

shipments was either not booked with Matson prior to its delivery, or the shipments arrived in advance of the Matson ship's scheduled receiving period. *Id.*

With respect to the shipments on which Matson was not listed as the consignee on the bills of lading, the court easily found that Matson could not be held liable for demurrage under the general principle that demurrage fees cannot be charged to non-parties to the transportation contract. *Id.* at 156-57. While the court recognized that demurrage charges may be implied to compensate the carrier for the use of its equipment, "the promise nonetheless arises out of the contractual relationship and may only be imputed to the parties to the contract." *Id.* at 156.

The court next addressed those instances where Matson was named as the consignee on the carrier's bill of lading. The court noted that "the sole difference between the two situations was the shipper's unilateral decision whom to name as consignee." *Id.* at 157. Significantly, there was no evidence that Matson had authorized the shippers to list it as the consignee or that the services Matson performed were any different in cases where it was named as the consignee. *Id.* The court distinguished Matson's position from situations "where the consignee was either the purchaser of the cargo or, at least, the person to whom final delivery was to be made and who thus had an interest in and control over the cargo." *Id.* The court declined to opine on "the question whether a consignee who has played an active role in the railroad transportation contract or has an interest in or control over

the goods may be liable for the demurrage." *Id.* Rather, its holding was limited to situations where a connecting carrier-consignee is simply named as the consignee in the bill of lading "without either more involvement on its part, or some culpability for the delay[.]" *Id.*

The carrier in *Illinois Central Railroad Co. v. South Tec Development Warehouse, Inc.*, 337 F.3d 813, 921 (7th Cir. 2003), likewise appeared to contend that a warehouse was a consignee because it was listed as such on some bills of lading for various shipments of paper. *Id.* at 821. After discussing *CSX* and *Matson,* the Seventh Circuit noted that "being listed by third parties as a consignee on some bills of lading is not alone enough to make [the warehouse] a legal consignee liable for demurrage charges, although it, coupled with other factors, might be enough to render [the warehouse] a consignee." *Id.* The court did not elucidate which "other factors" might tip the balance in favor of finding consignee status, and it left the ultimate determination for the district court on remand. *Id.* at 821-22. The court did, however, note that under the facts of that case, the carrier was aware that the warehouse was not a consignee but merely an agent for the shipper, seeming to suggest that a carrier's notice of the true relationship between the warehouse and the shipper might play a role in the determination of consignee status. *Id.*

Having considered the foregoing authorities, the Court finds that Union Pacific cannot hold Carry

Transit liable for demurrage charges. It is a fundamental tenet of contract law that parties to a contract cannot bind a non-party. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). And the cases discussed above show that, generally, a non-party to a transportation contract cannot be held liable for demurrage. *See Middle-Atl.*, 353 F.Supp. at 1116 (finding that liability for demurrage cannot be imposed on an agent who was not a party to the transportation contract); *Missouri K. & T. Ry. of Texas v. Capital Compress Co.*, 110 S.W. 1014, 1016 (Tex. Civ. App. 1908, writ ref'd). The Court declines to untether the law of demurrage from its contractual moorings. Carry Transit was not a party to the transportation contract between Union Pacific and the shippers and did not authorize the shippers to list it as a consignee in the bills of lading. The Court agrees with the principle enunciated in *Matson* and *CSX* that a party's (here, the shippers') unilateral decision to name a non-party to the transportation contract (here, Carry Transit) as a consignee without its consent does not render the non-party a consignee liable for demurrage charges. Therefore, Union Pacific must look elsewhere to recover its demurrage fees. The most likely candidates would be the shippers themselves, with whom Union Pacific had contracts and who were responsible for naming Carry Transit as the consignee in the relevant bills of lading. *See CSX Transp.*, 936 F.Supp. at 884.

Union Pacific urges a different result from the one reached by the Court, arguing that the facts of

this case are distinguishable from those in *CSX*, *Matson,* and *South Tec.* First, Union Pacific points out that the carrier in *CSX* claimed entitlement to demurrage based solely on the language of its tariff, which labeled the defendant as a consignee, while here Carry Transit's purported consignee status derives not from Union Pacific's tariff but from the bills of lading. The Court can discern no meaningful distinction between these two scenarios. In both cases, it is a third party – be it the carrier or the shipper – who is deciding whether a non-party to the transportation contract is labeled a consignee. Here, as in *CSX*, there is no evidence indicating that Carry Transit authorized its customers (i.e. the shippers) to list it as a consignee. (CT App. at 2); *CSX Transp.*, 936 F.Supp. at 884. In fact, Carry Transit has specifically advised its customers that it should be designated as the "care of" party on bills of lading provided to Union Pacific, not as the consignee. (CT App. at 3).

Union Pacific attempts to distinguish the facts of *Matson* and *South Tec* by pointing out that the defendants in those cases did not serve as the final destination for the goods at issue and that the carriers in both cases had actual knowledge that the defendants were merely agents as opposed to consignees. First, the Court is unable to find support in the *Matson* decision for Union Pacific's assertion that "the railroad had notice of Matson's limited role as named agent." (Pl.'s Resp. Brief at 7). The decision instead seemed to turn on the fact that there was no evidence that Matson authorized the shippers to consign goods

to it. *Matson,* 383 F.Supp. at 157. And while the Seventh Circuit in *South Tec* hinted in dicta that a carrier's notice of a receiver's agent-only status might have some bearing on whether a receiver is a consignee, Union Pacific has not referred this Court to any authority which holds that such notice is dispositive of the consignee inquiry, nor, for that matter, has it pointed to a single case where a carrier's lack of notice was sufficient to make an agent a legal consignee.

Union Pacific also argues that *Matson* and *South Tec* are distinguishable because the defendants in those cases served as mere stopping points on the rail line, as opposed to the final destination point. As stated above, the Matson Court did seem to indicate that a finding of consignee status is more likely in situations where a consignee is either the purchaser of the cargo or the person to whom final delivery was to be made, who, presumably, would have an interest in and control over the cargo. *Id.* at 157. Here, Carry Transit neither owns any of the food grade products shipped in Union Pacific rail cars, nor is it the person to whom final delivery is made. (CT App. at 2). Although Carry Transit's Arlington facility may be the final stop on the Union Pacific rail line, Carry Transit is merely a transloader that unloads products from the rail cars and then delivers them to locations designated by their customers. (*Id.*). Carry Transit cannot thus be said to have any beneficial interest in its customers' products that are transported by Union Pacific. Furthermore, this Court need not resolve the

question left unanswered by Matson – "whether a consignee who has played an active role in the railroad transportation contract or has an interest in or control over the goods may be liable for the demurrage []" – because Carry Transit had no role in the transportation contract at issue here and has not been shown to have an interest in the goods.

Ultimately, Union Pacific's claims in this case rest on its belief that it would be unfair to not hold Carry Transit liable for demurrage because Union Pacific had no notice that Carry Transit was not properly named as a consignee – all Union Pacific had to go by were the bills of lading provided to them by the shippers, which listed Carry Transit as the consignee. The plaintiff in *City of New Orleans v. Rapid Truck Leasing, Inc.*, 348 So.2d 1299 (La. App. 1977), made a similar argument. There, a shipper contracted with a carrier to ship tractors to the shipper's outlet in Utah. *Id.* at 1300. The shipper separately contracted with the defendant to load the tractor onto the carrier's boxcar. *Id.* The carrier prepared a freight waybill and delivered it to the plaintiff, with whom the carrier had contracted to place the car in the designated location and deliver it after loading to the carrier. *Id.* The waybill, however, erroneously listed the defendant as the shipper. *Id.* The plaintiff argued that it was entitled to collect demurrage from the defendant because the waybill, upon which it relied, reflected that the defendant was the shipper. *Id.* The plaintiff claimed that it should not be held responsible for errors in the bill of lading or the waybill and

that it is either the shipper's or the carrier's responsibility to ensure that such document [sic] were correct. *Id.* The court "fail[ed] to see how equitable principles could justify a judgment against defendant since it did not prepare either the waybill or the bill of lading." *Id.* Rather, the court found that the plaintiffs claim should have been aimed at the parties that prepared those documents. *Id.* at 1301 ("The fact that [the shipper] erroneously put defendant's name on the bill of lading as the shipper, or that [the carrier] erroneously put defendant's name on the freight waybill as the shipper, hardly provides a basis for a contract between defendant and plaintiff."). So too here, the Court finds that while Union Pacific may have a cause of action against the shippers who named Carry Transit as the consignee in the bills of lading, they do not have a cause of action against Carry Transit.

Union Pacific also argues that Carry Transit was required by 49 U.S.C. § 10743(a)(1) to provide it with notice of Carry Transit's agent-only status. That section provides that

> Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail carrier under this part. When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the

> consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property –
>
> (A) of the agency and absence of beneficial title; and
>
> (B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10743(a)(1). The Seventh Circuit has recognized that this section "applies only to agents who are also consignees, and not to agents who are *not* consignees." *South Tec,* 337 F.3d at 817 (emphasis in original). For the reasons stated above, the Court has found that Carry Transit was not a consignee. Section 10743(a)(1) thus has no application here.

Next, Union Pacific argues that Carry Transit "tacitly accepted" an obligation for demurrage charges by ignoring Union Pacific's invoices. Again, no authority is cited for this view.[4] And in any event,

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[4] Indeed, there is some evidence that Carry Transit did dispute the demurrage charges fairly early on. Carry Transit attaches to its summary judgment evidence a letter dated August 8, 2002 from James E. Blackmon, Carry Transit's president, to David Carroll in Union Pacific's Finance Department, in which Carry Transit denied responsibility for demurrage charges and stated that such charges "should be directed to

(Continued on following page)

the record does not reflect what steps *Union Pacific* took to determine why Carry Transit was ignoring its invoices for demurrage charges. An investigation into the matter might have revealed that Carry Transit did not consent to being named a consignee in the bills of lading provided by its customers to Union Pacific. In short, while the Court is not unsympathetic to Union Pacific's position, Union Pacific has failed to present any compelling legal reason in support of its position that Carry Transit – a non-party to the transportation contract that did not authorize its customers to name it as a consignee – should be held liable for accrued demurrage.

Union Pacific also argues that it should be compensated for the benefit derived by Carry Transit from the use of Union Pacific's rail cars. It points to evidence in the record showing that Carry Transit used the rail cars as silos for some of its customers' food grade products. Because Carry Transit benefitted from the use of Union Pacific's rail cars, Union Pacific argues that "compensation in the form of demurrage charges for their use is unquestionably appropriate." (Pl.'s Resp. Brief at 5). Again, Union Pacific offers no legal support to buttress its unilateral expectation of payment. The Court notes that plaintiffs in other demurrage cases have made similar arguments under various quasi-contractual

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the shippers." (CT App. at 4, 10). There is no evidence in the record, however, that this letter was ever sent.

theories, which have met with failure. *Matson*, 383 F.Supp. at 158 (noting that "it was the shipper's actions, or inactions, which necessitated the prolonged use of the railroad cars."); *Middle Atl. Conference,* 353 F.Supp. at 1125 ("We have not been referred to, nor has our own research disclosed, any cases which have ruled that the benefits which a warehouseman or agent might receive when he detains a carrier's equipment are such that the warehouseman should be required to compensate the carriers by way of demurrage."). And in any event, Union Pacific has neither pleaded any such quasi-contractual theories, nor has one been advanced in its briefing.

IV. Conclusion

For the reasons stated above, Carry Transit's Motion for Summary judgment is GRANTED and Union Pacific's Motion for Summary judgment is DENIED. The Court will enter a final judgment in accordance with this opinion by separate order.

SO ORDERED. SIGNED October 27, 2005

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CSX TRANSPORTATION COMPANY	**CIVIL ACTION NO: 04-CV-04018**
Plaintiff/Counterclaim Defendant	**Hon. Thomas N. O'Neill, Jr.**
vs.	
NOVOLOG BUCKS COUNTY	
Defendant/Counterclaim Plaintiff.	

CSX ADMISSIONS OF FACT

1. CSX issued 12 invoices to Novolog for the accrual of demurrage charges on rail cars, pursuant to the terms of CSX' demurrage tariff.

2. The demurrage charges noted on the invoice accrued on rail cars that were delivered by CSX to Novolog already loaded with freight, and empty rail cars that were ordered into Novolog's facility for loading.

3. With respect to the rail cars that were delivered to Novolog already loaded with freight, CSX delivered the rail cars to Novolog because Novolog was the consignee named on the bills of lading provided to CSX by various shippers for the movement of the freight.

4. CSX admits that, other than Novolog being the named consignee on bills of lading, and Novolog

having accepted delivery of the loaded rail cars by CSX, CSX had no separate contractual relationship with Novolog governing the movement and/or disposition of the detained rail cars.

Respectfully submitted,

KEENAN, COHEN & HOWARD P.C.

By: /s/ Kenneth J. Grunfeld

Paul D. Kennan
Kenneth J. Grunfeld
One Commerce Square
2005 Market Street, Suite 3520
Philadelphia, PA 19103
(215) 609-1110

Date: July 7, 2006

Attorneys for Plainitff/Counterclaim Defendant CSX Transportation Company

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CSX TRANSPORTATION COMPANY	**CIVIL ACTION NO: 04-CV-04018**
Plaintiff,	
vs.	**Hon. Thomas N. O'Neill, Jr.**
NOVOLOG BUCKS COUNTY	
Defendant.	

PLAINTIFF CSX TRANSPORTATION COMPANY'S BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF DEFENDANT NOVOLOG BUCKS COUNTY

* * *

A. Contested Facts Relied upon by Novolog in Opposing CSX' Motion for Summary Judgment

15. In early 2003, Mr. Reid was advised by Tim Hinkson, part of CSX's sales force, that CSX entered into a number of freight agreements with various consignors to move export steel goods from various origins.

16. The timing and logistics planning of the freight operations referenced in ¶ 15 above, were under the control of CSX and their respective shippers, who were the manufacturers of the steel cargo at issue.

17. As a result of the freight operations referenced in ¶ 15 above, an exceptional volume of rail cars arrived at the U.S. steel Fairless site in March, 2003. Novolog unloaded these rail cars according to instructions received from the respective consignees, who were the exporters of the steel cargo at issue.

***Answer*:**

Novolog's characterization of how CSX operates is inaccurate, and its characterization of other parties as "consignees" directly conflicts with information provided to CSX. CSX did not "arrange" for Novolog to receive steel, and had nothing to do with the decision of its consignors to ship steel to Novolog. Instead, CSX is simply a common carrier by rail, moving freight from origin to destination pursuant to instructions received electronically from the shipper's. Novolog was far from a passive player in this transaction: it had contracts with these shippers, who were its customers, for the handling of the steel; it knew that the steel was inbound before it arrived, and it had specific instructions from the shippers as to what to do with the steel when it did arrive. Novolog cannot blame the exceptional volume of rail cars it received on the shippers, since it knew in advance that the steel was inbound and agreed to accept the rail cars CSX' responsibility was only to move freight, not to investigate whether Novolog had the capacity to unload the railcars in a timely manner.

21. Novolog was not the party in whose name the rail cars of cargo at issue in CSX's First Amended

Complaint were ordered, or the party who furnished forwarding directions for said cargo. (Exh. K, Underwood Depo. Tr. at 41 line 9 to 48 line 6 [steel mill is the customer and selects the destination of the freight in the rail cars]; Exh. A, Reid Decl. ¶ 17; Novolog's Sixth Affirmative Defense.)

Answer:

This statement is inaccurate. Novolog was the actual party that often ordered empty rail cars from Conrail, CSX' agent, for it to load at its facility. *See* Reid Deposition at pp. 74-75. For all the traffic that originated at Novolog's facility, Novolog is named as the *shipper* on the waybill because in each situation it ordered the empty rail car into its facility for loading, and from CSX' perspective, it was the only known shipper. *See* Underwood Affidavit at ¶ 6.

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CSX TRANSPORTATION COMPANY	:	
Plaintiff/Counterclaim Defendant,	:	**CIVIL ACTION NO: 04-CV-04018**
v.	:	**Hon. Thomas N. O'Neill, Jr.**
NOVOLOG BUCKS COUNTY	:	
Defendant/Counterclaim Plaintiff	:	

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANT/ COUNTERCLAIM PLAINTIFF, NOVOLOG BUCKS COUNTY, INC.

Defendant/Counterclaim Plaintiff, Novolog Bucks County, Inc. ("Novolog"), by and through its undersigned counsel, submits its Statement of Undisputed Facts in support of its Motion for Summary Judgment.[1]

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[1] A specific reference to the parts of the record that support each undisputed statement of fact is set forth in a parentheses following each statement of undisputed fact. The exhibits referenced in this Statement of Undisputed Facts are set forth

(Continued on following page)

The undisputed facts set forth below, and the applicable law set forth in Novolog's accompanying Brief in Support of Motion for Summary Judgment, mandate that summary judgment be entered in Novolog's favor as to: (1) the First Amended Complaint filed by Plaintiff/Counterclaim Defendant, CSX Transportation Company ("CSX"), against Novolog; and (2) the Counterclaim filed by Novolog against CSX.

I.
THE PARTIES

1. At all times relevant to CSX's First Amended Complaint, Novolog was a Pennsylvania corporation with its principal place of business located at 1 Sinter Road, Fairless Hills, Pennsylvania 19030. (Exh. A, Reid Decl. ¶ 2; Exh. C, Novolog's Counterclaim ¶ 1.)

2. At all times relevant to CSX's First Amended Complaint, Novolog was a tenant at the U.S. Steel Fairless Works, a private rail-served industrial park on the Delaware River. (Exh. A, Reid Decl. ¶ 3; Exh. C, Novolog's Counterclaim ¶ 1.)

3. At all times relevant to CSX's First Amended Complaint, Novolog operated as a private port which functioned as the origin or destination of cargo, depending on whether the cargo was for import or

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in Novolog's accompanying Appendix of Documents in Support of Motion for Summary Judgment.

export or for domestic transload, which is the transfer of cargo from one mode of transportation to another. (Exh. A, Reid Decl. ¶ 4; Exh. C, Novolog's Counterclaim ¶ 1.)

4. At all times relevant to CSX's First Amended Complaint, David Reid ("Mr. Reid") was the President and Chief Executive Officer of Novolog. (Exh. A, Reid Decl. ¶ 1.)

5. At all times relevant to CSX's First Amended Complaint, CSX was a Virginia corporation with its principal place of business located at 500 Water Street, Jacksonville, Florida 32202. (Exh. C, Novolog's Counterclaim ¶ 1; Exh. D, CSX's Answer to Counterclaim ¶ 1.)

6. At all times relevant to CSX's First Amended Complaint, CSX operated as an interstate rail carrier. (Exh. C, Novolog's Counterclaim ¶ 1; Exh. D, CSX's Answer to Counterclaim ¶ 1.)

II.
CSX'S CLAIM AGAINST NOVOLOG

7. CSX seeks $260,304 in what it terms "incidental charges" against Novolog, allegedly billed pursuant to the provisions of 49 U.S.C. § 10746 and the rules promulgated thereunder relating to rail car use and distribution, and purportedly governed by the CSX Tariff 8100, Demurrage Section VIII-C. (Exh. B, CSX's First Amended Complaint; Exh. E, CSX's Initial Disclosures, § III. at 1-2; Exh. G, CSX's

Responses to Novolog's First Set of Interrogatories, producing CSX-0069 and CSX-0070.)

8. The "facts" that CSX proffers in support of its claim for demurrage charges against Novolog are: (1) the existence of CSX's Tariff 8100; (2) CSX's own demurrage bills forwarded to Novolog; and (3) CSX's document production in this action. (Exh. K, John Underwood, CSX Manager of Supplemental Revenue and CSX's Rule 30(b)(6) witness, 12/09/05 Deposition Transcript ("Underwood Depo. Tr.") at 24 line 2 to 25 line 19.)

9. CSX's position in this action is that the presence or handling by Novolog of certain CSX rail cars[2] at Novolog's facility, or the "constructive placement" of those rail cars at Novolog's facility, triggered the application of demurrage charges because such rail cars were allegedly not returned to CSX within the free time provided by CSX's Tariff 8100. (Exh. K, Underwood Depo. Tr. at 29 line 10 to 33 line 3; Exh. G, CSX's Responses to Novolog's First Set of Interrogatories No. 5 ["Novolog's obligation to pay demurrage arises from Novolog's acceptance of rail cars, its handling of said rail cars, and its failure to return said rail cars to CSX within the free time provided by the controlling tariff."].) CSX interprets "constructive

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[2] The rail cars at issue correspond to CSX's twelve "Incidental Bills" which are bates-stamped CSX-004 through CSX-0033 and CSX-0070. These "Incidental Bills" are listed on CSX's chart which is bates-stamped CSX-0069.

placement" to mean that a Conrail Shared Assets yard advised Novolog that certain CSX rail cars were ready for Novolog or "waiting their order" at a Conrail Shared Assets yard, such as Morrisville, which is the Conrail Shared Assets Yard nearest to Novolog. (*Id.* at 31 line 15 to 33 line 3.) CSX issued its incidental demurrage bills to Novolog because Novolog at some point took receipt of the rail cars at issue. (*Id.* at 30 line 15 to 31 line 4; Exh. G, CSX's Responses to Novolog's First Set of Interrogatories No. 5.)

III.
OPERATIONS AT U.S. STEEL FAIRLESS

10. At all times relevant to CSX's First Amended Complaint, rail services within the U.S. Steel Fairless site were provided by Conrail Shared Assets. (Exh. A, Reid Decl. ¶ 5.)

11. At all times relevant to CSX's First Amended Complaint, rail cars within the U.S. Steel Fairless site were delivered and picked up by Conrail Shared Assets, except for "unit trains" which were delivered and picked up directly by CSX and the Norfolk Southern Railway Company. (*Id.* ¶ 5.)

12. At all times relevant to CSX's First Amended Complaint, and since the splitting of Conrail into CSX and Norfolk Southern Railway Company, Novolog was recognized as an "open gate" facility. (*Id.* ¶ 6; Exh. H, Pertinent Portions David Reid 09/07/05 Deposition Transcript ("Reid Depo. Tr.") at 61 line 15 to 62 line 2.)

13. As an "open gate facility," Novolog received and held cars at the railroad's convenience using the approximately 700 car track available to Novolog as a tenant at the U.S. Steel Fairless site. (*Id.* ¶ 6.)

14. Novolog, at certain times, held CSX cars onsite for the railroad's convenience under this "open gate" provision. (*Id.*)

15. In early 2003, Mr. Reid was advised by Tim Hinkson, part of CSX's sales force, that CSX entered into a number of freight agreements with various consignors to move export steel goods from various origins. (*Id.* ¶ 7.)

16. The timing and logistics planning of the freight operations referenced in ¶ 15 above, were under the control of CSX and their respective shippers, who were the manufacturers of the steel cargo at issue. (*Id.*)

17. As a result of the freight operations referenced in ¶ 15 above, an exceptional volume of rail cars arrived at the U.S. Steel Fairless site in March, 2003. (*Id.*) Novolog unloaded these rail cars according to instructions received from the respective consignees, who were the exporters of the steel cargo at issue. (*Id.*)

IV.
NOVOLOG WAS NOT A PARTY TO ANY TRANSPORTATION CONTRACT FOR THE CARGO AT ISSUE

18. There was no contract, oral or written, between Novolog and CSX concerning the cargo at issue in CSX's First Amended Complaint. (Exh. G, CSX's Responses to Novolog's First Set of Interrogatories No. 5; Exh. C, Novolog's Seventh Affirmative Defense; Exh. A, Reid Decl. ¶ 13; *see also* Exh. I, Notice of CSX Rule 30(b)(6) Deposition at Schedule A, ¶ 10; Exh. J, Armand Pelliccione, Conrail Assistant Director of Operations, 09/23/05 Deposition Transcript ("Pelliccione Depo. Tr.") at 36 lines 2-10 [other than the Refund Contract which is the subject of Novolog's Counterclaim, he was not aware of any contracts between the parties]; Exh. K, Underwood Depo. Tr. at 24 line 2 to 25 line 19 [only facts allegedly (and mistakenly) supporting CSX's claim for demurrage against Novolog in this action are the existence of CSX's Tariff 8100, CSX's own demurrage bills, and CSX's document production in this action – which does not contain any contracts between the parties].)

19. Novolog was not a party to any transportation contract with CSX for the transport of the cargo at issue in CSX's First Amended Complaint. (Exh. G, CSX's Responses to Novolog's First Set of Interrogatories No. 5; Exh. A, Reid Decl. ¶ 15; Exh. C, Novolog's Seventh Affirmative Defense; Exh. H, Reid Depo. Tr. at 73 lines 1-20; *see also* Exh. I, Notice of CSX

Rule 30(b)(6) Deposition at Schedule A, ¶ 10; Exh. J, Pelliccione Depo. Tr. at 36 lines 2-10; Exh. K, Underwood Depo. Tr. at 24 line 2 to 25 line 19.)

20. Novolog and CSX never executed any contract designating Novolog as the shipper or consignee for the transport of the cargo at issue in CSX's First Amended Complaint pursuant to CSX's Tariff 8100, Demurrage Section VIII-C, Item 8035 entitled "Handling of Shipper Assigned Cars(s)." (Exh. G, CSX's Responses to Novolog's First Set of Interrogatories No. 5; Exh. A, Reid Decl. ¶ 16; Exh. H, Reid Depo. Tr. at 73 lines 1-20; *see also* Exh. I, Notice of CSX Rule 30(b)(6) Deposition at Schedule A, ¶ 10; Exh. J, Pelliccione Depo. Tr. at 36 lines 2-10; Exh. K, Underwood Depo. Tr. at 24 line 2 to 25 line 19.)

21. Novolog was not the party in whose name the rail cars of cargo at issue in CSX's First Amended Complaint were ordered, or the party who furnished forwarding directions for said cargo. (Exh. K, Underwood Depo. Tr. at 41 line 9 to 48 line 6 [steel mill is the customer and selects the destination of the freight in the rail cars]; Exh. A, Reid Decl. ¶ 17; Novolog's Sixth Affirmative Defense.)

22. Novolog never entered into any contract with CSX, or any other entity, whereby Novolog assumed liability for demurrage charges pursuant to CSX's Tariff 8100 or otherwise. (Exh. A, Reid Decl. ¶ 18; Exh. C, Novolog's Seventh Affirmative Defense; *see also* Exh. G, CSX's Responses to Novolog's First Set of Interrogatories No. 5; Exh. I, Notice of CSX

Rule 30(b)(6) Deposition at Schedule A, ¶ 10; Exh. J, Pelliccione Depo. Tr. at 36 lines 2-10; Exh. K, Underwood Depo. Tr. at 24 line 2 to 25 line 19.)

23. At all times relevant to CSX's First Amended Complaint and the cargo at issue therein, Novolog was a private port which operated simply as a geographical place – a destination – for the export cargo of coiled steel at issue. (Exh. A, Reid Decl. ¶ 19; Exh. C, Novolog's Fourth Affirmative Defense.)

24. At all times relevant to CSX's First Amended Complaint and the cargo at issue therein, Novolog never received, processed, or distributed its own goods, or had an interest in the cargo at issue through consignment – Novolog was only a service contractor hired principally by the exporters and, in exceptional circumstances by the manufacturers, to load or discharge their cargo to and from rail cars. (Exh. A, Reid Decl. ¶¶ 10, 20; Exh. C, Novolog's Fifth Affirmative Defense; Exh. H, Reid Depo. Tr. at 52 line 24 to 53 line 5, 73 lines 1-20.)

* * *

Dated: January 6, 2006

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(2)

No. 07-0752

2007 - 2233

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

NOVOLOG BUCKS COUNTY,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

PAUL D. KEENAN
Counsel of Record
CHARLES L. HOWARD
KEENAN COHEN & HOWARD P.C.
One Pitcairn Place, Suite 2400
165 Township Line Road
Jenkintown, PA 19046
(215) 609-1110

Counsel for Respondent

213279

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit ("Third Circuit") correctly held that parties that accept the delivery of freight and who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery, unless they act as agents of another and disclose that agency in compliance with the notification procedures established by the Interstate Commerce Commission Termination Act's ("ICCTA") consignee-agent liability provision at 49 U.S.C. § 10743(a)(1).

2. Whether the Third Circuit's holding creates a genuine conflict with the Seventh Circuit's resolution of similar issues in *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse*, 337 F.3d 813 (7th Cir. 2003), *Blanchette v. Hub City Terminals*, 683 F.2d 1008 (7th Cir. 1981) and *Evans Products Co., et al. v. I.C.C., et al.*, 729 F.2d 1107 (7th Cir. 1984).

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

CSX Corporation is the parent corporation of respondent CSX Transportation, Inc. ("CSX"),[1] is publicly held, and owns more than ten (10) percent of respondent's stock.

[1] Respondent's correct corporate name is "CSX Transportation, Inc."

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COUNTER-STATEMENT OF THE CASE

A. Proceedings below

In August of 2004, respondent CSX, a rail common carrier, brought this lawsuit against petitioner Novolog Bucks County ("Novolog"), an entity which operates a facility that receives delivery of steel by railcar, and ships steel by railcar, in the United States District Court for the Eastern District of Pennsylvania, in case number 04-CV-4018. CSX filed suit to recover unpaid demurrage charges incurred by Novolog during 2002 and 2003. Demurrage is a daily fee imposed for the possession and use of railroad owned railcars beyond the allowed "free-time" permitted by published tariff for loading or unloading. *CSX Trans. Co. v. Novolog Bucks County*, 502 F.3d 247, 251, note 1 (3d Cir. 2007), Appendix to Petition for Writ of Certiorari, App. at 4.[2]

After the close of discovery, the parties filed cross motions for summary judgment, each seeking judgment with respect to, *inter alia*, CSX's demurrage claims.[3]

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[2] References to Petitioner's Appendix hereinafter appear as follows: "App. at [appendix page No.]."

[3] In its Statement of the Case, Novolog inaccurately summarizes the basis for CSX's claim that Novolog was the consignee for all inbound freight at issue as set forth in CSX's motion for summary judgment. Petition for Writ of Certiorari ("Pet.") at 8 – 9. Novolog was the consignee (1) because it was identified as such on the bills of lading and (2) because it accepted the freight when it was delivered to the facility. Moreover, CSX never asserted that "Novolog was liable for demurrage as an

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On May 24, 2006, the District Court denied the parties' respective motions, holding that there was a genuine issue of material fact as to whether CSX's demurrage charges arose out of a separate contractual relationship, which the Court deemed to be a pre-requisite for demurrage liability. Both parties moved for reconsideration, and CSX also moved for conditional referral of certain issues to the United States Surface Transportation Board. On June 26, 2006, the District Court denied the parties' motions for reconsideration and CSX's referral motion.

(Cont'd)

agent for various unnamed consignees," nor did CSX ever assert that Novolog's agency status was a basis for Novolog's status as a consignee. Pet. at 9. It was Novolog which took the position that it was not a consignee and, therefore, not liable for demurrage because it allegedly,

> never received, processed, or distributed its own goods, or had an interest in the cargo at issue through consignment – Novolog was only a service contractor hired principally by the exporters and, in exceptional circumstances by the manufacturers, to load or discharge their cargo to and from railcars.

Novolog's Statement of Undisputed Facts in Support of Its Motion for Summary Judgment at ¶ 24, App. at 131. By implication, Novolog was arguing that it was an agent, and CSX responded accordingly by correctly arguing that Novolog had not complied with the notice provisions of 49 U.S.C. § 10743(a)(1) and was, therefore, liable for demurrage.

On July 7, 2006, CSX filed an admission with the District Court stating that:

> . . . other than Novolog being the named consignee on bills of lading, and Novolog having accepted delivery of the loaded railcars by CSX, CSX had no separate contractual relationship with Novolog governing the movement and/or disposition of the detained railcars.

The purpose of the CSX admission was two-fold: (1) to establish a predicate for finding that Novolog's own conduct had rendered it a party to the underlying transportation contract and (2) to dispose of the irrelevant factual "issue" of whether Novolog was party to a separate contractual relationship which governed the disposition of detained railcars.

On July 12, 2006, the District Court entered an Order for judgment as a matter of law in favor of Novolog and against CSX with respect to CSX's demurrage claim, effectively granting Novolog's original motion for summary judgment on CSX's demurrage claim. CSX appealed.

In a carefully reasoned opinion, and after briefing and oral argument by the parties and by *amici curiae*, the United States Court of Appeals for the Third Circuit vacated the District Court's entry of summary judgment in Novolog's favor and remanded the case to the District Court for further consideration in light of its holding

regarding consignee liability. The Third Circuit specifically held as follows:

> We hold that recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another and comply with the notification procedures established in ICCTA's consignee-agent liability provision, 49 U.S.C. § 10743(a)(1).

Novolog Bucks County, 502 F.3d at 254, App. at 13.[4] This holding is the apparent subject of the instant petition.

B. Material Facts[5]

CSX filed its Amended Complaint seeking to recover

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[4] Elsewhere in its opinion, the Third Circuit also held that an entity named as the sole consignee on a bill of lading is "presumptively liable for demurrage." *Id.* at 250 and 262, App. at 2, and 31 – 32.

[5] The material facts as summarized herein are those on which the Third Circuit and the District Court relied. App. at 3-7, and 38-47, respectively. CSX would also note that, in its Petition, Novolog states that, with respect to various issues, the District Court did or did not render findings of fact. Pet. at 5, 12 and 23. District courts do not make "findings of facts" when resolving a motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986). District courts simply determine whether there is a genuine issue of material fact which would prevent it from resolving the case as a matter of law. *See, e.g., CSX*

(Cont'd)

payment of inbound and outbound railcar demurrage charges accrued by Novolog and itemized on twelve (12) invoices sent to Novolog on a monthly basis from December, 2002 through August, 2003. The total amount due on all invoices is $260,304.00. Novolog failed to object to any of the monthly invoices for accrued demurrage charges assessed against it by CSX.

For each railcar movement consigned for delivery to Novolog's facility identified in the demurrage bills, Novolog was named as the sole *consignee* on the electronic bill of lading and waybill. For each railcar movement that originated at Novolog's facility identified in the demurrage bills, Novolog was named as the *shipper* (or consignor) on the electronic waybill because it ordered CSX to provide it with the empty railcars for loading for transportation.

Other than Novolog having been named the sole consignee on bills of lading, and Novolog having accepted delivery of the loaded railcars by CSX, CSX had no separate contractual relationship with Novolog governing the movement and/or disposition of the detained railcars.

CSX publishes a tariff subject to the jurisdiction of the United States Surface Transportation Board which governs its rights and obligations to collect demurrage charges. The applicable tariff is CSXT 8100. Novolog received and was aware of this tariff. [6]

(Cont'd)
Transportation Co. v. Novolog Bucks County, No. 04-cv-4018, 2006 U.S. Dist. LEXIS 32917, *2, note 1, and *14 – 15 (E.D. Pa. May 24, 2006), App. at 38 and 48.

[6] Pertinent text from CSX Transportation Tariff CSXT 8100, Demurrage Section, Section VIII-C, App. at 85-99.

Novolog was engaged in unloading full railcars and loading empty cars with goods, usually consisting of steel products. With respect to loaded inbound railcars, Novolog received full railcars, unloaded them as the "ship to" party or the consignee, and eventually released the empty railcars back to CSX.

C. Legal basis for the assessment of demurrage charges

Rail carriers such as CSX are required, by statute, to impose demurrage charges on those entities which use freight railcars to ship goods. *See* 49 U.S.C. § 10746[7]; *see also St. Louis, Southwestern Railway Co. v. Mays*, 177 F. Supp. 182, 184 (E.D. Ark. 1959) (rail carriers are "under a duty to collect and the shipper or consignee is under a duty to pay [demurrage].")

Federal courts have consistently held that demurrage charges can be imposed "against a consignor, consignee or owner of the property, *or* others by statute, contract or prevailing custom." *See, e.g., Novolog Bucks County*, 502 F.3d at 254, App. at 13 (principle that demurrage may be imposed against a consignor, consignee or owner of the property, or on others by statute, contract, or prevailing custom is both "well-established and oft-repeated") (citations omitted); *Illinois Central Railroad Co., v. South Tec Development Warehouse, Inc.*, 337 F.3d 813, 820 (7th Cir. 2003) ("[defendant] would be liable only if it were a consignee *or* if it contractually assumed responsibility for the demurrage charge") (emphasis added); *see also*

[7] The complete text of the statute is set forth in Pet. at 3.

Evans Products Co., et al. v. I.C.C., et al., 729 F.2d 1107, 1113 (7th Cir. 1984).

It is equally "well-established and oft-repeated" that a "consignee becomes a party to the transportation contract, and is therefore bound by it, upon accepting the freight; thus it is subject to liability for transportation charges even in the absence of a separate contractual agreement . . .". *Novolog Bucks County*, 502 F.3d at 254 – 255, App. at 13; *see also Louisville & Nashville Ry. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 70, 44 S. Ct. 441, 68 L. Ed. 900 (1924) ("if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later"); *Erie R. Co. v. Waite*, 62 Misc. 372, 114 N.Y.S. 1115 (1909) (demurrage may be imposed upon consignees independently of statute or express contract); *Gage v. Morse*, 94 Mass. 410, 12 Allen 410, 90 Am. Dec. 155 (Mass. 1866) ("[i]f the consignee will take the goods, he adopts the contract"); *Zarati S.S. Co., v. Park Bridge Corp.*, 154 F.2d 377, 380 (2d Cir. 1946) (a consignee who is "not a party to the original contract and so is not bound to accept the cargo at any particular time, and, therefore, incurs no responsibility for delay according to the terms of the contract . . . *may be liable for damages in the nature of demurrage for unreasonable and improper detention in the unloading of the vessel.*") (emphasis added) (citations omitted).

A consignee who is an agent for a disclosed principal, however, is not liable for demurrage. *Union Pacific*

Railroad Co. v. Ametek, Inc., 104 F.3d 558, 563 (3d Cir. 1997), *citing Middle Atlantic Conference v. ICC*, 353 F. Supp. 1109 (D.D.C. 1972). Furthermore, if the bills of lading governing a particular shipment identify the consignee as a "care of" party, the agency relationship is deemed to have been disclosed, and the consignee-agent is not subject to liability for demurrage charges. *Novolog Bucks County,* 502 F.3d at 258, note 12, App. at 22 (citations omitted).

A consignee who is acting in the capacity of an agent of a principal, but whose agency has not been disclosed to the carrier, either expressly on the bill of lading or otherwise, may, however, avoid demurrage liability by providing written notice of the agency relationship to the carrier. *Novolog Bucks County,* 502 F.3d at 255 – 56, App. at 15 – 16. The requirement for such notice is set forth at 49 U.S.C. § 10743(a)(1)[8]. *Id.* In the instant case, Novolog has not and does not allege that it ever provided CSX with any notice of its alleged agency.

REASONS FOR DENYING THE PETITION

A. THERE IS NO REAL CONFLICT BETWEEN THE THIRD AND SEVENTH CIRCUITS ON THE ISSUE OF DEMURRAGE LIABILITY WHICH REQUIRES RESOLUTION BY THIS COURT.

The basis for Novolog's Petition for Writ of Certiorari is an alleged conflict between the Third

[8] The language of the statute is set forth in Petitioner's Brief at 2 – 3.

Circuit's holding in *Novolog Bucks County* and several decisions rendered by the Seventh Circuit, primarily *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse,* 337 F.3d 813 (7th Cir. 2003).[9] There is, however, no real or genuine conflict between the decisions rendered by the circuit courts of appeal. The so-called conflict is based upon language which appears in *South Tec,* and which is nothing more than *dicta* taken out of context. Moreover, the factual bases for each of the decisions are substantially different and readily distinguishable.

1. The decision rendered by the Third Circuit is not in conflict with the *South Tec* decision rendered by the Seventh Circuit.

In *South Tec,* the United States Court of Appeal for the Seventh Circuit ("the Seventh Circuit") reviewed a district court's entry of summary judgment in favor of a rail carrier seeking to recover demurrage charges from a warehouse which had received shipments of freight.[10] The district court had held that 49 U.S.C. § 10743(a)(1) applied to the defendant, that the defendant had not complied with that statute, and, therefore, the defendant was liable for demurrage. The district court, however, did not make a finding that the defendant was the consignee on the bills of lading.

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[9] The other decisions are *Blanchette v. Hub City Terminals,* 683 F.2d 1008 (7th Cir. 1981) and *Evans Products Co., et al. v. I.C.C., et al.,* 729 F.2d 1107 (7th Cir. 1984) both of which are addressed below.

[10] The Third Circuit summarized the facts giving rise to the demurrage claim in *South Tec. Novolog Bucks County,* 502 F.3d at 259 – 260, App. at 25.

In reversing the district court, the Seventh Circuit first noted that section 10743(1)(a) "applies only to agents who are also consignees, and not to agents who are *not* consignees." *South Tec*, 337 F.3d at 817 (citations omitted) (emphasis in original). The Seventh Circuit refused to apply § 10743(a)(1) because there was no factual basis to do so in light of the fact that whether or not the defendant was a consignee was a question that had never been answered by the district court. *Id.*

Notably, the Seventh Court stated that, "*[i]n order for us to uphold the application of [section 10743(a)(1)]*, the district court . . . must have found South Tec to be the consignee of the disputed shipments." *Id.* (emphasis added). The clear, unambiguous implication of that statement is that, had there been a finding by the district court that the defendant was the consignee named on the bills of lading, the Seventh Circuit would have applied section 10743(a)(1) when determining whether the defendant's status as a consignee – agent protected it from demurrage liability.[11]

Rather then reach its own determination of whether the defendant was a consignee, the Seventh Circuit remanded that issue back to the district court. *Id.* at 820. Before doing so, however, it "briefly consider[ed] whether the district court's assumption that South Tec

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[11] That consignee status is a necessary predicate for application of section 10743(a)(1) is further buttressed by the Seventh Circuit's instruction to the district court on remand where it said, "[t]o the extent that the agency status of a legal consignee may be a factor, the notice provisions of 49 U.S.C. § 10743(a)(1) may still be relevant." *Id.* at 821.

was a consignee may have been correct."[12] *Id.* The Seventh Circuit's "consideration" of that assumption involved examining "somewhat analogous situations" addressed in three prior court decisions; *CSX Transportation, Inc. v. City of Pensacola*, 936 F. Supp. 880 (N.D. Fla. 1995), *Southern Pac. Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154 (N.D. Cal. 1974), and *Evans Products Co. v. I.C.C.*, 729 F.2d 1107 (7th Cir. 1984). *Id.*, at 821.

The cases which the Seventh Circuit "considered" were, in fact, analogous to the case before it. For example, in *City of Pensacola*, the defendant had not been identified as a consignee on a single bill of lading, *City of Pensacola*, 936 F. Supp. at 883, and the *City of Pensacola* court relied on that fact when deciding that the defendant was not liable for demurrage. *South Tec*, 337 F.3d at 821. In *Matson*, the defendant did not appear as the consignee on most of the bills of lading which originated with the same shipper, *Matson*, 383 F. Supp. at 155, and the *Matson* court relied on that fact when it decided that the defendant was not liable for demurrage. *South Tec*, 337 F.3d at 821. The Seventh Circuit was appropriately giving due consideration to cases which were analogous to the case at hand in that the *South Tec* defendant had been identified as the consignee on no more than ten percent of the bills of lading at issue, all of which had been issued by the same shipper. *South Tec*, 337 F.3d at 821. The other ninety percent of the bills of lading identified other entities as the consignee. *Id.*

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[12] Not surprisingly, Novolog characterized the Seventh Circuit's "brief" consideration of several cases as a "survey [of] the existing law on demurrage . . .". Pet. at 17.

The factual basis for the Third Circuit's holding in *Novolog Bucks County*, however, stands in stark contrast to the factual basis for the Seventh Circuit's *dicta* in *South Tec*. In *South Tec*, the defendant appeared as consignee on no more than ten percent of the bills of lading. On the remaining ninety percent of the bills of lading, a different entity was identified to the rail carrier as the consignee. Novolog, however, appeared as the sole consignee on every single bill of lading at issue. As the sole named consignee, Novolog accepted the freight when CSX delivered it to Novolog's facility. On the basis of those undisputed facts, the Third Circuit applied "well-established and oft-repeated principles" and determined that Novolog was "presumptively liable for demurrage charges." *Novolog Bucks County*, 502 F.3d at 250, App. at 2.

Once the Third Circuit had determined that Novolog was presumptively liable for demurrage, it completed the analysis by determining whether Novolog had acted as another's agent and had complied with section 10743(a)(1). *Id.* at 262, App. at 31-32. That last step in the Third Circuit's analysis was not in conflict with the Seventh Circuit's analysis, but instead, was entirely consistent with what the Seventh Circuit had said it would have done if there had been a finding by the district court that the *South Tec* defendant was a consignee, i.e., it would have "[upheld] the application of [§ 10743(a)(1)]". *South Tec.*, 337 F.3d at 817.

Not only is there an absence of any "conflict" between the Third Circuit and the Seventh Circuit with respect to how each would apply § 10743(a)(1) in a demurrage context, there is also no conflict between the Third Circuit's holding that Novolog is a legal consignee with demurrage liability and the Seventh Circuit's *suggestion* that perhaps the *South Tec* defendant *might not be* a consignee. The Third Circuit applied well-established legal principles to a situation where the defendant (1) was the sole, named consignee on the bills of lading and (2) had accepted delivery of the freight. Similarly, the Seventh Circuit gave due consideration to cases where the defendant had only been identified as the consignee on a small percentage of bills of lading (*Matson*), or had not been identified as such at all (*City of Pensacola*), which was certainly appropriate in light of the fact that those cases were factually analogous to the case it was deciding. In fact, the Seventh Circuit stated that simply being "listed . . . as a consignee on *some* bills of lading is not alone enough to make South Tec . . . liable for demurrage charges . . .". *South Tec*, 337 F.3d at 821 (emphasis added). That the Third Circuit reached a different conclusion than the Seventh Circuit *might have reached* with regard to the consignee status of the respective defendants is neither surprising, nor is it evidence of a "conflict" in light of the distinguishable fact patterns presented in each case.[13]

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[13] The Third Circuit's determination of Novolog's consignee status also corrected the District Court's erroneous holding that a railroad's right to impose demurrage *must* arise out of "a contractual relationship regarding railcars with the entity that detained the railcars." *See Novolog Bucks County*, 2000 U.S. Dist. LEXIS 32917, *25, App. at 56. The District Court's holding was

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South Tec is also distinguishable from *Novolog Bucks County* in that the defendant in *South Tec* had "reported" that the rail carrier "understood [the defendant] not to be a consignee but an agent of [a third party]". *South Tec*, 337 F.3d at 821. In the instant case, however, there was no evidence adduced in the proceedings below that would indicate or even suggest that CSX knew or had reason to know that Novolog was conducting itself as anyone's "agent." Novolog certainly offered no such evidence to the District Court in support of its motion for summary judgment.[14] *See* Pertinent text of Novolog's Statement of Undisputed Facts in Support of Motion for Summary Judgment in *CSX Transp. Co. v. Novolog Bucks County, No. 04-CV-4018, filed January 6, 2006*, App. at 123 – 131. Furthermore, Novolog makes no such argument in the instant Petition for Writ of Certiorari. *See* Pet. at 10.

The Third Circuit actually *held* that Novolog was a consignee which had not complied with the requirements of section 10743(a)(1) and was, therefore, liable for demurrage based on facts which were not in dispute. On the other hand, the Seventh Circuit only *suggested* that

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in direct conflict with the *South Tec* and *Evans* decisions, *see* Counter-Statement of the Case, *supra* at section I(c), both of which held that liability for demurrage could be imposed on a consignee *or* as the result of a contractual obligation to pay demurrage.

[14] Notwithstanding the monthly receipt of demurrage invoices from CSX over a period of several months, Novolog never responded to any invoice with protest or disclosure of an agency relationship with a disclosed principal.

South Tec *might not be* a consignee based on substantially dissimilar facts, and remanded the ultimate determination of South Tec's status to the district court. The Seventh Circuit also indicated that it would have applied section 10743(a)(1) if South Tec had been determined to be a consignee. Had the Third Circuit and the Seventh Circuit been presented with identical or at least similar facts, and had the two circuits rendered conflicting or inconsistent rulings based on those facts, then perhaps Rule 10(a) of the Rules of the United States Supreme Court might be implicated. This, however, is not the case. Instead, Novolog attempts to create a conflict where one does not exist solely for the purpose of manufacturing a basis for writ of certiorari.

2. The decision rendered by the Third Circuit is not in conflict with the Seventh Circuit's decision in *Blanchette v. Hub City Terminals*.

Novolog also argues that the Third Circuit's application of § 10743(a)(1) to demurrage charges is in conflict with another decision by the Seventh Circuit in *Blanchette v. Hub City Terminals*, 683 F.2d 1008 (7th Cir. 1981). Pet. at 27. A careful reading of *Blanchette*, however, reveals that, again, Novolog has identified a "conflict" which is simply non-existent.

Blanchette involved a claim for demurrage charges asserted by the trustee of Penn Central, a rail carrier, against Hub City, a freight consolidator. Penn Central argued that, since Hub City was always either the consignor or the consignee of the shipments, it was the entity liable for the detention charges. *Blanchette*, 683 F.2d at 1009. Hub City countered by arguing, *inter alia*,

that 49 U.S.C. § 3(2)(1976), which was the predecessor statute to § 10743(a)(1), relieved it of liability for detention charges. *Id.* at 1010-1011.

Although Novolog argues that, in *Blanchette*, the Seventh Circuit "interpreted [the predecessor statute] as not applying to detention charges", Pet. at 27, the Seventh Circuit did nothing of the sort.[15] The Seventh Circuit first recognized that "[t]he purpose of this section of [the predecessor statute] was to relieve from liability agent-consignees who paid in full carriers' *initial* bills, which the carrier *later discovered* were lower than the rate required by the tariff." *Blanchette*, 683 F.2d at 1011 (emphasis added). The Court then noted that Penn Central had submitted the entire bill to Hub City, and that "[n]o additional amounts were later found to be due under the tariff. Rather, the railroad billed Hub City for the amounts due to it for line transportation and trailer detention charges." *Id.* Since Penn Central's claim did not involve "later discovered" charges, the Court refused to apply the predecessor statute. More importantly, the Seventh Circuit never said that the predecessor statute did not apply to detention charges.

Curiously, when the Seventh Circuit indicated in *South Tec* that it would, in fact, apply section 10743(a)(1)

[15] Novolog's argument comes *verbatim* from the Third Circuit's discussion of *Blanchette*. *Novolog Bucks County*, 501 F.3d at 257, note 9, App. at 18. The Third Circuit's reference to *Blanchette's* treatment of "detention charges", when read in context, appears to relate solely to the detention charges at issue in the *Blanchette* case. Novolog, however, has taken the Third Circuit's statement out of context and has characterized it as a general rule to be applied to all detention charges regardless of the context.

to a demurrage claim if the defendant were a consignee, it gave no consideration at all to its prior decision in *Blanchette*. Apparently, the Seventh Circuit did not believe that it had ever held or even had ever intimated that section 10743(a)(1) would not apply to detention charges.[16]

The Third Circuit's reference to the *Blanchette* decision does not create a conflict. The Third Circuit did acknowledge that the "purpose" of the predecessor statute was indeed as stated by the Seventh Circuit in *Blanchette*. *Novolog Bucks County*, 502 F.3d at 257, note 9, App. at 18. The Third Circuit also recognized, however, that the predecessor statute may have had multiple purposes, and that the Seventh Circuit's treatment of the statute in *Blanchette* "by no means excludes its applicability to other kinds of charges that can arise after delivery. Thus we decline to so limit its reach." *Id.* The Third Circuit did nothing more than recognize that the scope of section 10743(a)(1) was not limited to only "later discovered" freight, line haul charges.

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[16] Novolog also recognizes that the *South Tec* decision is not inconsistent with the *Blanchette* decision. Pet. at 26, note 14. Novolog, however, in acknowledging that consistency, misstates the conclusions reached by the *South Tec* court. The Seventh Circuit did not, as stated by Novolog in note 14, conclude that the district court erred by holding a warehouse liable for demurrage charges simply because of non-compliance with section 10473(a)(1). As fully discussed above, the Seventh Circuit reversed the district court because it had applied section 10743(a)(1) without having made a factual finding that the defendant was a consignee. *South Tec*, 337 F.3d at 817.

3. The decision rendered by the Third Circuit is not in conflict with the Seventh Circuit's decision in *Evans Products Co. v. I.C.C.*

Novolog also makes an implied argument that the Third Circuit's decision is in conflict with the Seventh Circuit's decision in *Evans Products Co., et al. v. I.C.C., et al.*, 729 F.2d 1107 (7th Cir. 1984). Pet. at 18 – 19. The issue in *Evans* was whether switching charges could be imposed upon car repair facilities simply because repair facilities were named in a tariff. The Seventh Circuit held that there could be no liability because repair facilities "... are not consignors or consignees of the cars because delivery of the cars as freight is not completed and the carrier's lien is not extinguished when the repair facility receives the car." *Evans Products*, 729 F.2d at 1113. The operative facts of *Evans* stand in stark contrast to the instant case, wherein Novolog was unquestionably the only named consignee, the cars were delivered and accepted by Novolog, and CSX's lien was extinguished upon Novolog's receipt of the car.

The Seventh Circuit's holding in *Evans* has no application to the facts of this case, as Novolog was clearly the named consignee and acted as such in taking accepting delivery of the goods consigned to it under multiple bills of lading. The fact that the Third Circuit correctly determined that *Evans* was distinguishable on its facts and, therefore, not "particularly instructive" is certainly not an indication that the circuits are in conflict. *See Novolog Bucks County*, 502 F.3d at 262, note 14, App. at 31.

B. THE THIRD CIRCUIT'S REFUSAL TO "FOLLOW" THE *SOUTH TEC* DECISION IS CONSISTENT WITH AND SUPPORTIVE OF CLEAR CONGRESSIONAL INTENT WITH RESPECT TO NATIONAL TRANSPORTATION POLICY.

Notwithstanding the fact that there is no real, genuine conflict between the circuits on these issues, the Third Circuit did, in fact, expressly "decline to follow the Court of Appeals for the Seventh Circuit's recent conclusion in [*South Tec*] that the entity listed as the consignee on the relevant bills of lading was not, without more, the legal consignee under section 10743."[17] *Novolog Bucks County*, 502 F.3d at 259, App. at 25. The Third Circuit identified several reasons why it chose not to follow the literal language used by the Seventh Circuit in *South Tec*, not the least of which is that "the *South Tec* court's approach frustrates the statute's intent . . .". *Novolog Bucks County*, 502 F.3d at 260, App. at 27.

The Third Circuit recognized that the clear intent of section 10743(a)(1), as discerned directly from the language of the statute itself, neither contemplates nor supports the " 'designation-plus' " interpretation of the statute suggested by the Seventh Circuit in *South Tec*. *Id.*, at 260, App. at 27. The Third Circuit also correctly noted that, under the *South Tec* analysis, section 10743(a)(1)'s notification provisions would apply

[17] While the Third Circuit clearly indicated that the literal application of the Seventh Circuit's comment was incorrect, the Seventh Circuit's comment appears to have been directed to the circumstance presented in *South Tec*, where 90% of the bills of lading identify entities other than the defendant as the consignee, and only 10% show the defendant as consignee.

"only when the carrier does not already have notice – through other bills of lading or otherwise – that the named consignee is acting as the agent of another." *Id.* The Third Circuit recognized the impracticality and inefficiency of such a result. *Id.* Moreover, if Congress had intended such a result, it could have drafted language that would have accomplished that result. The Third Circuit correctly concluded that adopting the Seventh Circuit's literal comment to the clear, unambiguous language of the statute would frustrate the "statute's clear rule." *Id.*

The Third Circuit's refusal to "follow" *South Tec* is also correctly grounded in national transportation policy, which Congress expressly incorporated into the demurrage statute, and which is set forth at 49 U.S.C. § 10746.[18] *See Novolog Bucks County*, 502 F.3d at 258 – 59, App. at 23 – 24. The Third Circuit first noted that "[c]ompensation of the railroads for the use of their equipment is a secondary purpose of demurrage charges", *Novolog Bucks County*, 502 F.3d at 259, App. at 23 (citations omitted), and then succinctly explained how its holding, in conjunction with the plain meaning of section 10743, is consistent with and supportive of national transportation policy:

> For demurrage charges to fulfill their purpose of ensuring the smooth functioning of the rail freight system by creating disincentives against delays, railways must be able to assess them effectively and without being mired in disputes. Section 10743 is designed to ensure

[18] The text of this statute can be found in Pet. at 3.

> just that. The simple rule that the named consignee becomes liable for demurrage charges upon acceptance of the freight unless it timely notifies the carrier of an agency relationship allows railroads to rely on the bills of lading and avoid wasteful attempts to recover from the wrong parties. For their part, recipients of freight who should not be saddled with liability for transportation charges arising after delivery can escape it with little effort by simply providing written notice of their status to the carrier.

Novolog Bucks County, 502 F.3d at 259, App. at 23 – 24. To hold otherwise would require every rail carrier to investigate the identity of the true, undisclosed consignee on every bill of lading for every shipment made by rail.

C. THE THIRD CIRCUIT'S RULING ON DEMURRAGE LIABILITY IS BOTH FAIR AND JUST.

Novolog argues that its petition should be granted because the Third Circuit's decision is "inherently inequitable to Novolog . . . and thus, fails to serve the interests of justice." Pet. at 20. Novolog's stated reason for arguing "the equities" is that the Seventh Circuit's demurrage decisions are "inherently more equitable than the Third Circuit's" analysis. Pet. at 24. Regardless of whether or not there is any merit to Novolog's equitable arguments (and CSX does not concede that there is), the mere fact that one circuit's application of the law may be "fairer" than another circuit's application is hardly evidence of a split between the circuits.

Moreover, the fact that one circuit's actual application of a statute may be perceived to be less equitable to one party than how another circuit might apply the same statute is hardly evidence of judicial error.

In arguing that equitable considerations should, somehow, provide a basis for granting its petition, Novolog first complains that, since it had nothing to do with the preparation of the bills of lading, it therefore had no control over its liability for demurrage. Pet. at 21. Novolog's argument is, however, essentially nothing more than an "ignorance of the law" defense, in that, to accept the argument, a court would first have to believe that Novolog did not know (1) that the bill of lading prepared for every shipment of freight identifies both the shipper and the consignee, (2) that a carrier is allowed to deliver freight only to the entity identified as the consignee on the bill of lading, (3) that acceptance of the freight by the consignee renders the consignee a party to the transportation contract, and (4) that rail carriers are required by statute to charge for demurrage when their railcars are detained by consignors or consignees for periods longer than the "grace period" set forth in the demurrage tariffs of rail carriers. In the unlikely event that a court would actually find that Novolog was ignorant of all of those well-settled principles, it would then have to hold that ignorance of the law is a defense. Novolog's argument rings hollow and must be rejected out of hand.

Novolog then argues that "CSX had recourse under its tariff . . . to impose any requisite demurrage charges

upon its shipper-customers." Pet. at 23. That argument flies in the face of CSX's tariff which expressly states that,

> [u]nless otherwise advised, in WRITING, that another party is willing to accept responsibility for demurrage, *consignor at origin* or *consignee at destination* will be responsible for the payment of demurrage charges.

CSX Transportation Tariff CSXT 8100, Section VIII-C, Demurrage Plan – Item 8070(G), App. at 93 (emphasis added). On its face, CSX's tariff prevents CSX from collecting demurrage charges at destination for delays in unloading from anyone other than the consignee, and also prevents it from collecting demurrage charges at origin for delays in loading from anyone other than the consignor.

In support of its "recourse" argument, Novolog notes that the District Court had similarly concluded that CSX would have recourse against entities other than Novolog for demurrage charges which arose from Novolog's failure to unload or load railcars in a timely fashion.[19] Pet. at 23. The District Court was similarly wrong. The Third Circuit, however, was certainly aware of the limitations which CSX's tariff places on CSX's ability to pursue its shippers for demurrage charges incurred by

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[19] In its Petition, Novolog portrays itself as a victim of the steel shippers' unauthorized designation of Novolog as consignee. If this is true, Novolog would presumably have recourse against such shippers – yet Novolog has asserted no such claims.

consignees. *See Novolog Bucks County*, 502 F.3d at 251, App. at 4-5. Presumably, the absence of any recognition or discussion of a "recourse remedy" in the Third Circuit's opinion results directly from its understanding of CSX's tariff limitations.

Novolog also argues "that CSX had notice from Novolog of the final destinations of the actual consignees and shipper/consignors – none of which were Novolog," implying that CSX somehow had notice that Novolog was not the actual consignee on the shipments at issue. Pet. at 10 and 23. A rail carrier such as CSX, however, has no reason to know of or care about the "final destination" of freight unless that destination is the rail destination identified on the bill of lading as the consignee, which in this case was always Novolog. In support of its argument, Novolog refers to the District Court's discussion of CSX's documentation of its claim. Pet. at 23 – 24 and App. at 44 – 45. A careful reading of the District Court's discussion, however, reveals that CSX's documentation included, among other things, 198 pages of waybills listing Novolog as the shipper and various steel companies as consignees, and 563 pages of waybills listing Novolog as the consignee and various steel companies as the shipper. App. at 45.

CONCLUSION

For the reasons more fully set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PAUL D. KEENAN
Counsel of Record
CHARLES L. HOWARD
KEENAN COHEN & HOWARD P.C.
One Pitcairn Place, Suite 2400
165 Township Line Road
Jenkintown, PA 19046
(215) 609-1110

Counsel for Respondent

81

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NOVOLOG BUCKS COUNTY,

Petitioner,

v.

CSX TRANSPORTATION COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION

CONRAD O. KATTNER
Counsel of Record
FREDERICK A. TECCE
MCSHEA\TECCE, P.C.
1717 Arch Street, 28th Floor
Philadelphia, PA 19103
(215) 599-0800

Counsel for Petitioner

Dated: January 22, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Petitioner, Novolog Bucks County's corporate disclosure statement was set forth at page *ii* of its petition for writ of certiorari, and there are no amendments to that statement.

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REPLY TO BRIEF IN OPPOSITION

Petitioner, Novolog Bucks County ("Novolog"), respectfully files this reply brief in support of its petition for writ of certiorari ("Novolog's petition").

CSX'S STATEMENT OF MATERIAL FACTS IS INACCURATE

The statement of "material facts" submitted by respondent, CSX Transportation Company ("CSX"), in its brief in opposition ("Br. Opp.") is not inaccurate.

CSX states that "Novolog failed to object to any of the monthly invoices for accrued demurrage charges assessed against it by CSX." Br. Opp. at 5. This is incorrect. Novolog's president and chief executive officer, David Reid ("Reid"), protested CSX's demurrage charges.[1]

[1] *See CSX Transp. Co. v. Novolog Bucks County*, No. 04-CV-4018, 2006 WL 1451280 (E.D. Pa. May 24, 2006) ("May 24, 2006 Mem.") set forth in the Appendix to Novolog's petition ("App.") at App. 37-79. This decision references, *inter alia*, Novolog's evidence of: (1) a September 12, 2003 email from Reid to CSX "stating that Novolog was not the shipper or consignee or freight forwarder of the steel goods in CSX's railcars and explaining Novolog's view of the demurrage charges"; and (2) an April 10, 2003 letter from Reid to J.M. Woodall ("Woodall"), CSX's vice president of metals, "protesting CSX's demurrage charges." *See* App. 46-47.

CSX states:

> For each railcar movement consigned for delivery to Novolog's facility identified in the demurrage bills, Novolog was named as the sole *consignee* on the electronic bill of lading and waybill. For each railcar movement that originated at Novolog's facility identified in the demurrage bills, Novolog was named as the shipper (or consignor) on the electronic waybill because it ordered CSX to provide it with the empty railcars for loading for transportation.

Br. Opp. at 5 (emphasis in original). This is not a statement of fact; it is a summary of CSX's argument. The United States District Court for the Eastern District of Pennsylvania ("district court") declined to make a finding as to whether Novolog was named as the consignee or as the shipper on the relevant bills of lading. *See* May 24, 2006 Mem. at App. 45 n.4 and App. 46 n.6; *see also* opinion from the United States Court of Appeals for the Third Circuit ("Third Circuit"), *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 250 (3d Cir. 2007) ("we cannot determine what the bills of lading showed here") at App. 2.

CSX states that "[t]he applicable tariff is CSXT 8100." Br. Opp. at 5. This is not entirely correct. While CSX argues that its CSXT 8100 tariff ("CSX's Tariff") governs the demurrage dispute between the parties, Novolog contests the application of this tariff to non-CSX customers such as Novolog. *See* Novolog's petition at 5-6 and 23.

CSX states that "Novolog received and was aware of" CSX's Tariff. Br. Opp. at 5. This is misleading. CSX omits the relevant time frame for such statement. Novolog received, and first reviewed, CSX's Tariff when Reid received a copy of the document from CSX as an enclosure to an April 9, 2003 letter from Woodall that advised Reid of CSX's imposition of demurrage charges against Novolog.[2]

Finally, CSX asserts that "[w]ith respect to loaded inbound railcars, Novolog received full railcars, unloaded them as the 'ship to' party or the consignee, and eventually released the empty railcars back to CSX." Br. Opp. at 6. This is not a statement of fact; it is CSX's legal argument. Novolog denies that it unloaded any shipment of freight in the railcars at issue as the consignee.

ARGUMENT

I. DECISIONS OF THE THIRD CIRCUIT AND SEVENTH CIRCUIT CONFLICT ON A DEMURRAGE ISSUE OF VITAL IMPORTANCE TO TRANSLOADERS, AND OTHER SIMILARLY SITUATED ENTITIES, AND RAIL CARRIERS

CSX argues that the Third Circuit's decision below is not in conflict with the decisions rendered by

[2] *See* May 24, 2006 Mem. at App. 47 (noting Woodall's April 9, 2003 letter to Reid and the copy of CSX's tariff).

the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") in *Illinois Cent. R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003) and *Evans Prods. v. Interstate Commerce Comm'n*, 729 F.2d 1107 (7th Cir. 1984). Br. Opp. at 9-15 and 18. This argument lacks merit, and is based upon CSX's misinterpretation of the case law.

The Third Circuit's decision below is in conflict with the Seventh Circuit on the same important matter, *i.e.*, whether the notification and liability provisions of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10743(a)(1), automatically apply to a transloader or other such entity (*e.g.*, a warehouseman or pier operator) – that is not a party to a rail carrier's transportation contract or any contract whereby it agrees to accept demurrage liability, has no beneficial ownership of the freight at issue, and does not authorize a consignee designation – merely because a third party unilaterally lists it as the consignee on a bill of lading and it accepts delivery of the freight.

In *South Tec*, the Seventh Circuit held that the district court erred by holding a warehouse liable for demurrage charges for non-compliance with § 10743(a)(1)'s consignee-agent notification provisions, and instructed the district court to review the record for evidence of whether the warehouse contractually assumed liability for demurrage charges and was the legal consignee for the paper shipments at issue. 337 F.3d at 822. In reaching this decision, the Seventh Circuit ruled that: (1) that § 10743(a)(1)

"applies only to agents who are also consignees, and not to agents who are not consignees"; and (2) mere listing of an entity as the consignee on the relevant bills of lading did not, without more, render that entity the legal consignee under § 10743. *South Tec*, 337 F.2d at 817, 821.

Despite these clear rulings by the Seventh Circuit, CSX argues that there is no real conflict between the decisions of the Seventh Circuit and Third Circuit regarding their respective application of § 10743. CSX, analyzing the import of the *South Tec* decision, asserts:

> Notably, the Seventh Court [sic] stated that, "*in order for us to uphold the application of [section 10743(a)(1)]*, the district court . . . must have found South Tec to be the consignee of the disputed shipments." *Id.* (emphasis added). The clear, unambiguous implication of that statement is that, had there been a finding by the district court that the defendant was the consignee named on the bills of lading, the Seventh Circuit would have applied section 10743(a)(1) when determining whether the defendant's status as a consignee – agent protected it from demurrage liability.

Br. Opp. at 10.

The Third Circuit's decision below belies CSX's skewed analysis of the *South Tec* holding. The Third Circuit ruled:

> [W]e decline to follow the Court of Appeals for the Seventh Circuit's recent conclusion in a similar case that the entity listed as the consignee on the relevant bills of lading was not, *without more*, the legal consignee under Section 10743. *See South Tec*, 337 F.3d at 821. *See also Union Pacific Railroad Co. v. Carry Transit*, No. 3:04-CV-1095-B (N.D. Tex. Oct. 27, 2005) (following *South Tec*).

Novolog Bucks County, 502 F.3d at 259 (emphasis added), App. 25. Consequently, the Third Circuit held – in conflict with the Seventh Circuit – that "a transloader or other such entity, if named on the bill of lading as the sole consignee, is presumptively liable for demurrage charges arising from unloading delays, unless it accepts the freight as the agent of another and notifies the carrier of its status in writing prior to delivery [pursuant to the provisions of § 10743(a)(1)]." *Id.* at 250 (emphasis added), App. 2.

CSX also erroneously argues that since Novolog was designated as the consignee on all the purported waybills and bills of lading in this case, while the defendant in *South Tec* was only designated as the consignee on some bills of lading, there is no true conflict between the rulings in the two cases. Br. Opp. at 11-15. CSX's emphasis on the number of times an entity has been designated as the consignee is

misplaced, and does not provide a basis for this Court to decline to resolve the important questions presented in Novolog's petition.

The operative ruling in *South Tec*, and the cases the *South Tec* court cites with approval (*i.e.*, *Evans Prods.*, 729 F.2d 1107; *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F. Supp. 880 (N.D. Fla. 1995); and *Southern Pac. Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154 (N.D. Cal. 1974)), is that the unilateral designation of an entity as consignee on a bill of lading is not sufficient to make the entity a legal consignee for purposes of imposing demurrage liability with respect to that bill of lading. *See South Tec*, 337 F.3d at 821. It is the *unilateral designation* of the term "consignee" – not the number of times an entity was so-designated – which is the focus of these decisions. *See, e.g.*, *Evans Prods.*, 729 F.2d at 1113 ("No liability exists merely on account of being named in the bill of lading or handling the property") (citations omitted); *City of Pensacola*, 936 F. Supp. at 884 ("[t]he unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage") (citing *Matson*, 383 F. Supp. at 157; and *Missouri, K. & T. Ry. Co. of Texas v. Capital Compress Co.*, 110 S.W. 1014, 1016 (Tex. Civ. App. 1908)); and *Matson*, 383 F. Supp. at 157.

For example, the court's holding in *Matson* did not turn on the fact that the defendant was not named as the consignee on the majority of the bills of lading as CSX suggests. The decision turned on the

fact that there was no evidence in the record that Matson authorized the shippers to consign goods to it. *Id.* Moreover, with respect to the shipments for which Matson was not listed as the consignee on the bills of lading, the court easily found that Matson could not be held liable for demurrage under the general principle that demurrage fees cannot be charged to non-parties to the transportation contract. *Id.* at 156-57. The court next addressed those instances where Matson was named as the consignee on the carrier's bills of lading and specifically noted that "the sole difference between the two situations was the shipper's unilateral decision whom to name as consignee." *Id.* at 157. The court distinguished Matson's position from situations "where the consignee was either the purchaser of the cargo or, at least, the person to whom final delivery was to be made and who thus had an interest in and control over the cargo." *Id.* The court refused to countenance a result that, under the facts of the case, would place Matson's liability totally within the shipper's control. *Id.*

CSX further attempts to distract this Court from the operative holding in *South Tec*, by arguing that in *South Tec* the rail carrier "understood" the defendant was not the consignee and was acting in an agency capacity, but in this case CSX supposedly had "no reason to know" of Novolog's non-consignee status. Br. Opp. at 14. This argument should be disregarded for several reasons.

First, the Seventh Circuit merely hinted in dicta in *South Tec* that the rail carrier had notice that the defendant-warehouse was not a consignee, and that this fact *may* be relevant "[t]o the extent that some form of notice may play a role in the determination of consignee status[.]" *South Tec*, 337 F.3d at 821.

Second, CSX does not refer this Court to any authority which holds that such notice is dispositive of the consignee inquiry, or point to any case where a carrier's lack of notice was sufficient to make an agent a legal consignee. In fact, courts have rejected such an argument. *See, e.g., Carry Transit, Inc.*, No. 3:04-CV-1095-B at App. 113-114 (carrier's argument that it had no notice that defendant was not properly named as consignee because all it "had to go by were the bills of lading provided to them by the shippers, which listed [the defendant] as the consignee[,]" did not justify imposition of demurrage charges against defendant that did not prepare the waybills or the bills of lading); *City of New Orleans v. Rapid Truck Leasing, Inc.*, 348 So.2d 1299, 1300-01 (La. App. 1977) (where defendant did not prepare either the waybill or bill of lading, plaintiff was not entitled to collect demurrage from defendant on the theory that the waybill upon which plaintiff relied reflected that defendant was the shipper).

Third, the record reflects that Novolog had no reason to know that CSX's shipper-customers incorrectly designated it as the consignee, as opposed to the "care of" party, on the purported waybills and bills of lading in this case. It is undisputed that

Novolog had no part in the preparation of the waybills or bills of lading. CSX also does not contest the fact that it did not present any evidence in the district court proceeding that the bills of lading at issue were ever forwarded to Novolog upon their issuance or at any time, including any time prior to delivery of the freight to Novolog's facility.

Finally, CSX produced documents during discovery establishing its receipt of notice of particular consignee and final destinations designations for loads of freight in the railcars at issue. These documents identify the final destinations and identities of the actual consignees and shipper/consignors at issue – none of which were Novolog. *See* Novolog's petition at 10 and 23-24. CSX does not challenge these facts. Instead, CSX incredibly argues that it has "no reason to know or care about the 'final destination' of freight. . . ." Br. Opp. at 24.[3]

Accordingly, this Court should grant Novolog's petition and resolve the conflict between the Seventh Circuit and the Third Circuit concerning the application of § 10743(a)(1).

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[3] *See also* Novolog's statement of undisputed facts, ¶¶ 23 and 24 (not contested by CSX) at App. 131 (discussing Novolog's status as a port and service contractor).

II. THE THIRD CIRCUIT'S REFUSAL TO FOLLOW THE SEVENTH CIRCUIT'S DEMURRAGE DECISIONS IS NOT CONSISTENT WITH AND SUPPORTIVE OF THE LEGISLATIVE INTENT WITH RESPECT TO NATIONAL TRANSPORTATION POLICY

While the legislative intent in enacting 49 U.S.C. § 10746 might have been to ensure "the smooth functioning of the rail freight system by creating disincentives against delays[,]" as discussed by the Third Circuit,[4] the Third Circuit's interpretation and application of § 10743(a)(1) below (in conflict with the Seventh's Circuit's interpretation and application thereof), is not consistent with and supportive of such policy.

Initially, Novolog asserts there is a conflict between the Third Circuit and the Seventh Circuit as to whether the provisions of § 10743(a)(1) should be construed to include demurrage charges, as opposed to "payment of rates for transportation for a shipment of property" as the statute specifically provides. CSX disagrees with this position. *Compare* Novolog's petition at 25-27 *with* Br. Opp. at 15-17. Contrary to CSX's arguments, this Court should resolve the issue as to whether the provisions of § 10743(a)(1) pertain to the imposition of demurrage charges.

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[4] *See Novolog Bucks County*, 502 F.3d at 259, App. at 23.

In any event, contrary to CSX's argument that the Third Circuit's decision is "consistent with" and "supportive of" a purported national transportation policy to create disincentives against delays in the rail freight system (Br. Opp. at 19-21), such a policy is *not served* by penalizing transloaders in Novolog's position, and other similarly situated entities, by assessing them with demurrage charges simply because a shipper erroneously designates them as the consignee instead of the "care of" party on a bill of lading. Novolog had no knowledge that the shippers incorrectly designated it as the consignee as opposed to the "care of" party on the purported bills of lading, or that the steel was inbound to its facility before it arrived. Thus, Novolog was unable to provide CSX with notice of its "care of" status along with "the name and address of the beneficial owner of the property if it [was] reconsigned or diverted to a place other than the place specified in the original bill of lading" *before the delivery of the freight to its facility* as required by the Third Circuit's application of § 10743(a)(1).

The Third Circuit's § 10743(a)(1) analysis – in contrast with the Seventh Circuit's – compels a "no-win" situation for Novolog, and similarly situated entities, because it places their liability for demurrage charges exclusively within the control of other parties. Such an inequitable result is obviously not what Congress intended when it enacted § 10746 or § 10743(a)(1).

CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the decision of the Third Circuit below.

Respectfully submitted,

CONRAD O. KATTNER
Counsel of Record
FREDERICK A. TECCE
MCSHEA\TECCE, P.C.
1717 Arch Street, 28th Floor
Philadelphia, PA 19103
(215) 599-0800

Counsel for Petitioner

Dated: January 22, 2008